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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

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**STATEMENT UNDER RULE 10(b) OF THE
RULES OF THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

(Caption—53 CR 169)

• • •

Now comes ROBERT SIMMONS, the defendant-appellant in the above-entitled cause, by KARL M. MILGROM, his attorney, and, pursuant to Rule 10(b) of the United States Court of Appeals for the Seventh Circuit, states as follows:

1. This proceeding was commenced by the filing of an indictment by the Grand Jury on March 12, 1953;

2. The indictment named ROBERT SIMMONS as a defendant. The other party to the suit and named in the indictment caption was the UNITED STATES OF AMERICA;

3. The defendant entered his plea of not guilty on May 19, 1953;

4. Following the indictment and pending trial, the defendant was allowed to remain at liberty by the trial court, the defendant being then admitted to bail taken in the amount of ONE THOUSAND DOLLARS (\$1,000.00);

5. The trial was had on September 18, 1953, without a jury before the Honorable JULIUS J. HOFFMAN, Judge of the United States District Court;

6. Said Judge JULIUS J. HOFFMAN on September 18, 1953, found the defendant, ROBERT SIMMONS, guilty as charged in the indictment and sentenced the defendant to two (2) years imprisonment, the execution of such sentence being then stayed for ten (10) days, and the defendant being allowed to remain at large during that time on the ONE THOUSAND DOLLAR (\$1,000.00) bond previously executed by him;

7. On September 28, 1953, the defendant, ROBERT SIMMONS, filed a notice of appeal; and

8. On September 28, 1953, the trial court admitted the defendant to bail then taken in the amount of ONE THOUSAND DOLLARS (\$1,000.00), pending appeal to the United States Court of Appeals for the Seventh Circuit.

Karl M. Milgrom
Attorney for Defendant-Appellant

DOCKET ENTRIES

(The following are the complete docket entries to and including October 23, 1953.)

(Caption—53 CR 169)

• • •

3/12/53 Filed Indictment - 1 p. (JS-2)
 " " " Order to issue bench warrant & fix bond at
 \$1,000.00 - BARNES, J.
 Iss. bench warrant with copy of indict. att. rw
 4-15-53 Filed Appearance Bond of deft. (\$1,000.00) P
 4-22-53 Filed Bench Warrant ret'd. served. \$11.30 P
 4-27-53 Filed appearance of Karl M. Milgrom s
 5-19-53 Deft enters plea of not guilty & es contd generally-
 Perry, J s
 5-20-53 Mld ntc
 MAY 22 1953 Cause Reassigned to Calendar of Judge
 Hoffman
 6-29-53 To Gov & by agreement cause set for trial on Sept.
 18, 1953-Hoffman, J

• • •

" " " Filed notice
 " " " Mld ntc s
 6-29-53 Mot of Gov & by agreement cause set for trial on
 Sept. 18, 1953-Hoffman, J
 6-30-53 Mld ntc s
 9-18-53 Fld subp d.t. (Otto Kerner, Jr., U. S. Atty) ret'd
 served

- 9-18-53 Filed Affidavit in opposition to motion to quash subpoena (3)
- 9-18-53 Mr. Otto Kerner Jr. & Kline Weatherford appeared in ans to subpoena duces tecum & lv gv Govt to file mo to quash said subpoenas & deft gv lv to file affidavit in opposition to said mo & mo of Gov to quash subpoena duces tecum served upon Otto Kerner & Kline Weatherford be & is alld-Hoffman, J.
- 9-21-53 Mld ntes s
- 9-18-53 Cause called for trial. Jury waived. Evidence heard, arguments heard finding of guilty, *judgment* on the finding of guilty. Deft sentenced in the custody of the Atty Gen for a period of 2 yrs. Execution stay for period of 10 days-same bond to stand on appeal - Hoffman, J. JS3
- 9-18-53 Filed Jury Waiver
- " " " Filed motion for judgment of acquittal (4)
- 9-22-53 Mld ntes s
- 9-21-53 Issued commitment & copies to U. S. Marshal
- 9-28-53 Filed Notice of Appeal of Defendant-appellant (1)
- " Mailed Copy of Notice of Appeal to U. S. Atty., and copy with statement of docket entries to U. S.-C. A., 7th Cir.
- " Enter order admitting defendant Robert *Simmons*, to bail in the sum of \$1,000.00 pending appeal of the judgment entered herein on Sept. 18, 1953 to the U. S. C. A. Seventh Circuit -DRAFT-Hoffman, J. (1)
- Mailed notice to Attys. 9-28-53 AND ALSO Mailed notice to U. S. Marshal
- 9-28-53 Filed Bond on appeal (2)B
- 10-6-53 Order extending time for filing by Robert *Simmons*, defendant-appellant, of his *deisgnation* of contents if record on appeal, to and including October 23, 1953; giving him leave to substitute a photostatic or printed copy for each of the original exhibits received in evidence, herein; requiring the Official

Court Reporter to mark such photostatic and printed copies as the original exhibits are marked; requiring Clerk of this Court to certify and incorporate such photostatic and printed copies of all said original exhibits in the record on appeal, and to forward such copies to the Clerk of the Court of Appeals for the Seventh Circuit on the appeal taken from the judgment entered on September 18, 1953-Hoffman, J.
DRAFT

10-7-53 Mld ntes Atty & U. S. s

10-23-53 Filed Defendant-Appellant's Designation of record on appeal (2)

" Filed Defendant-Appellant's Statement Of Points (1)B

• • •

INDICTMENT

Filed March 12, 1953)

(Caption—53 CR 169)

• • •

The March 1953 Grand Jury charges:

That on or about the ninth day of February, 1953, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

ROBERT SIMMONS,

the defendant, being a male person who is required to and did register under the provisions of the Universal Military Training and Service Act, and who duly became a registrant with Local Selective Service Board Number 150, 220 North Sheridan Road, Waukegan, Illinois, and was duly classified in Class 1-A, and was ordered to report for induction by said Local Board, and who did report for induction as ordered, and was examined and qualified for induction,

and who was thereupon charged with the duty of submitting to induction, in accordance with the provisions of the Universal Military Training and Service Act, and the rules and regulations thereunder, more particularly Regulation 1632. 14(b)(5), then and there unlawfully, wilfully, knowingly and feloniously did neglect and fail and refuse to perform the duty of submitting to induction; all in violation of the Universal Military Training and Service Act, Section 462, Title 50, App., United States Code.

A TRUE BILL:

[Signature]

Otto Kerner Jr
United States Attorney

• • •

SUBPOENA DUCES TECUM

(Filed September 8, 1953)

Case No. 53 CR 169

UNITED STATES DISTRICT COURT
Northern District of Illinois

**THE PRESIDENT OF THE UNITED
STATES OF AMERICA**

To OTTO KERNER, JUNIOR, United States District Attorney;
and KLINE WEATHERFORD, Agent in Charge of the Chi-
cago Office of the Federal Bureau of Investigation;

—GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Honorable JULIUS J. HOFFMAN one of the Judges of the United States District Court for said District, on the eighteenth (18th) day of September, A.D. 1953, at 10:00 o'clock in the forenoon and from day to day thereafter until the below men-

tioned cause is determined in Room 245 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein UNITED STATES OF AMERICA is Plaintiff and ROBERT SIMMONS

Defendant, on the part of said ROBERT SIMMONS And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, a certain Federal Bureau of Investigation investigative report submitted to ROY WEST, as Hearing Officer of the United States Department of Justice, in connection with the hearing conducted by said Hearing Officer relating to the conscientious objector Selective Service status of said ROBERT SIMMONS. And this you shall in nowise omit, under the penalty of the law in that case made and provided. To the Marshal of the Northern District of Illinois to execute and return in due form of law

SEAL
COPY

Roy H. Johnson

Clerk

DATED: 9-16-53

By William E. Keeley, Jr.

Deputy Clerk

• • •

AFFIDAVIT IN OPPOSITION TO MOTION TO QUASH SUBPOENA

(Filed September 18, 1953)

(Caption—53 CR 169)

• • •

STATE OF ILLINOIS

COUNTY OF COOK

} SS.

KARL M. MILGROM, being duly sworn upon his oath, deposes and says:

I am a member of the bar of this Court. My offices are at 19 South LaSalle Street, Chicago 3, Illinois. I am the attorney of record for the defendant herein;

The defendant is charged by indictment with the offense of a violation of Title 50, Appendix, Section 462, United States Code, in refusing to submit to induction. The defendant has pleaded not guilty. Upon trial the defendant will contend that a judgment of acquittal ought to be entered because the draft board order commanding him to appear for induction is void because the draft boards violated the rights of defendant and illegally denied his claim for deferment as conscientious objector, opposed to both combatant and noncombatant service. The defendant expects to show that the actions of the local board and appeal board are illegal, *arbitrary* and capricious. He will attempt to show that the determination of the Special Assistant to the Attorney General in finding that the defendant was not a conscientious objector, opposed to both combatant and non-combatant military service, is without basis in fact, contrary to law, arbitrary and capricious;

Pursuant to the requirement of Section 6 (j) of the Universal Military Training and Service Act, the Department of Justice made an inquiry as to the defendant before hearing was held by the hearing officer. This inquiry was conducted by one or more Federal Bureau of Investigation agents, the name or names of whom are unknown to the defendant. The results of the inquiry were reduced to writing and made into a report to the hearing officer. The report, upon information and belief, contains unfavorable but illegal and hearsay evidence and statements that were relied upon by the hearing officer in his adverse report to the Department of Justice and by the Special Assistant to the Attorney General in his findings and denial of defendant's claim. It is necessary that the defendant examine and see such report relied on against him in the administrative agency in order to properly defend at the trial of the indictment in this case;

The report, upon information and belief, is in the hands

of either the United States District Attorney or the Agent in Charge of the Chicago Office of the Federal Bureau of Investigation. Each of these persons has been duly served with subpoena duces tecum to produce such report upon the trial of this action;

The defendant is not engaged in a fishing expedition. The production of the Federal Bureau of Investigation report and the giving of testimony required by the subpoena are material and necessary for the defense to the indictment upon the trial of this case. They will show affiant is informed and believes and so states the fact to be: that defendant is a matter of law, a conscientious objector and not liable for unlimited service; and that defendant did not get a fair resume of adverse evidence in said report. Even though the report sought by the subpoena may be claimed to be confidential by the Government, it must be produced because such document is a part of and forms the basis of the administrative determination and action supporting the indictment which is questioned by the defendant;

Since the validity of the administrative determination cannot be established unless and until there is such examination of the entire administrative record and testimony relied upon by the Department of Justice, which Department recommended the denial of the claim for classification as conscientious objector opposed to all military service, it is necessary for the Court to deny the motion to quash the subpoena;

If the motion to quash the subpoena is granted, the defendant will be deprived of right to due process of law, contrary to the Fifth Amendment to the United States Constitution and rights guaranteed by the Selective Service Regulations and Rule 17 (a) (c) of the Federal Rules of Criminal Procedure;

If the motion to quash the subpoena is granted, the defendant will be denied his right to confrontation of witnesses that have developed the evidence for the case against him. The draft board orders which set in motion the chain of events resulting in the prosecution are supported by the

determination made by the hearing officer of the Department of Justice. The defendant is entitled to examine the entire record of evidence in the Federal Bureau of Investigation report as to the reasons for recommending denial of his claim for classification as a conscientious objector under the decision by Judge Hand in *Kulick v. Kennedy*, 157 F. 2d 811 (C. A. 2d); and

A denial of the right to offer into evidence the Federal Bureau of Investigation report in this case will be prejudicial and will deprive the defendant of his right to be confronted by evidence given by the witnesses responsible for denial of the conscientious objector status. If he is denied the right of confrontation of the evidence by these witnesses there will be a denial of constitutional rights secured by the Sixth Amendment to the United States Constitution.

Karl M. Milgrom

Subscribed and sworn to before me this
18th day of September, 1953.

Emma E. Jacob

Notary Public.

[SEAL]

• • •

ORDER QUASHING SUBPOENA

(Filed September 18, 1953)

Hoffman, J.

September 18, 1953

(Caption—53 CR 169)

• • •

This day come the parties by their counsel and Mr. Otto Kerner, Jr., United States Attorney and Mr. Kline Weatherford, Special Agent in charge, Federal Bureau of Investigation, Chicago, Illinois, U. S. Department of Justice, Chicago, Illinois, appear in answer to subpoena duces tecum served upon them and it is

ORDERED that leave be and is hereby granted to the Government to file its motion to quash said subpoena duces tecum and that leave be and is hereby granted to the defendant to file an affidavit in opposition to said motion to quash and upon due consideration the Court being fully advised in the premises it is

FURTHER ORDERED that the motion to quash the subpoena duces tecum served upon said Mr. Otto Kerner, Jr., and Mr. Kline Weatherford be and the same is hereby allowed and that said subpoena duces tecum be and the same are hereby quashed.

• • •

MOTION FOR JUDGMENT OF ACQUITTAL

(Filed September 18, 1953)

(Caption—53 CR 169)

* * *

Now comes the defendant, ROBERT SIMMONS, and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The undisputed evidence shows that the defendant is not guilty as charged.

4. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.

5. The denial of the ministerial classification is illegal, arbitrary and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and Regula-

tions; and they did not follow the definition of the term used in the Act and Regulations in determining the claim of the defendant as a minister of religion.

6. The denial of the ministerial classification by the draft boards was arbitrary and capricious because they illegally held that Jehovah's Witnesses and the Watchtower Bible and Tract Society, Inc., do not constitute a recognized religious organization under the Act and Regulations.

7. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his performance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main work of the ministry, and that, according to the Act and Regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church and pursues such preaching work as his vocation and does not preach incidentally to the performance of any secular work; and therefore the draft board order is illegal, contrary to law and without basis in fact.

8. The denial of the conscientious objector status by the local board and the board of appeal and the recommendation by the hearing office of the Department of Justice and by the Department of Justice to the board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

9. The recommendation of the hearing officer relied upon by the Department of Justice and the board of appeal, and the report of the Department of Justice to and relied upon by the board of appeal are arbitrary, capricious and illegal because they refer to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advise the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act

and Regulations was the only thing for the hearing officer, Department of Justice, and appeal board to follow.

10. The undisputed evidence and the draft board records show that the local board deprived the defendant of his procedural rights to due process of law by failing to notify him of his classification following personal appearance, in that the local board failed to mail to the defendant a classification card (SSS Form No. 110) following his personal appearance as required by Section 1624.2 of the Regulations.

11. The local board deprived the defendant of procedural rights to a full and fair hearing before the board of appeal by failing to make an adequate and full written memorandum of the new additional oral evidence given by the defendant upon the occasion of his personal appearance, which new and additional oral evidence does not otherwise appear in the written papers sent to the board of appeal.

12. The undisputed evidence shows that the local draft board violated the Regulations by concluding that the defendant was not entitled to claim the conscientious objector classification because he had made the claim for exemption as a minister of religion.

13. The undisputed evidence shows that the local draft board violated the Regulations by denying the defendant his claim for classification as a conscientious objector because he had pressed before that board at his personal appearance his claim for exemption as a minister of religion.

14. The use of the secret investigative report of the Federal Bureau of Investigation without notifying or confronting the defendant with the substance of, or the parts of it, which were considered by or relied upon by the hearing officer upon the occasion of the hearing before the Department of Justice hearing officer and also the failure to include all of the evidence in the Federal Bureau of Investigation report relied upon by the hearing officer and all that appeared in the Federal Bureau of Investigation report and that was considered by the hearing officer, and also, the failure to put all of such evidence in the Federal

Bureau of Investigation report in the draft board file for the use of the board of appeal and the court, constitutes a deprivation of defendant's rights to procedural due process of law in violation of the Fifth Amendment to the United States Constitution and also is a clear and unequivocal violation of the Universal Military Training and Service Act and the Regulations promulgated thereunder. (Section 1622.1 (b)).

15. The Government has failed to prove that the defendant received from the hearing officer at his conscientious objector hearing a fair resume of any adverse evidence contained in the Federal Bureau of Investigation investigative report which was considered or relied upon by that officer at such hearing.

16. The undisputed evidence shows that the local board acted arbitrarily and capriciously and in violation of Section 1625.2 of the Regulations by refusing to reopen and consider anew the defendant's last classification of I-A upon the showing by the defendant prior to the time scheduled for his induction that such induction would result in extreme hardship and privation to his wife, which facts were not considered by that board when the defendant was so classified, resulted from changed circumstances over which he had no control, and if true, justified a change in the defendant's classification to III-A.

17. The failure of the court to compel the production of the Federal Bureau of Investigation investigative report, and the order of the court sustaining the motion to quash the subpoena duces tecum made by the Government, constitute a deprivation of the defendant's rights to due process of law upon criminal trials contrary to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also violate the statutes and rules of court providing for

the issuance of subpoenas in behalf of defendants in criminal cases.

Karl M. Milgrom
Attorney for Robert Simmons,
Defendant.

• • •

JUDGMENT AND COMMITMENT

(Filed September 18, 1953)

(Caption—53 CR 169)

• • •

This cause this day coming on for trial comes the United States by the United States Attorney comes also the defendant Robert Simmons in his own proper person and by his counsel and *neing* informed by the Court of his right to a trial by Jury waives that right in writing in open Court the United States Attorney consenting thereto and the Court approving such waiver and thereupon this cause is submitted to the Court for trial without a Jury and the Court now having heard all the evidence adduced, the arguments of counsel and being fully advised in the premises finds the defendant guilty as charged in the Indictment and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore considered and

ORDERED AND ADJUDGED by the Court and is the sentence and judgment of the Court upon a finding of guilty that the defendant ROBERT SIMMONS be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for and during the term and period of TWO (2) YEARS and it is

FURTHER ORDERED that execution of sentence be and the same is hereby stayed for a period of Ten (10) Days and

that the bond of the defendant heretofore filed herein shall remain in full force and effect.

Julius J. Hoffman
UNITED STATES DISTRICT JUDGE

September 18, 1953

• • •

TRANSCRIPT OF PROCEEDINGS

(Filed November 3, 1953)

[Tr. 1]

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 53 CR 169)

• • •

TRANSCRIPT OF PROCEEDINGS had at the hearing of the above-titled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, sitting in his court room in the United States Court House, Chicago, Illinois, on September 18, 1953, at 10:00 o'clock a.m.

• • •

[Tr. 44]

(Caption—No. 53 CR 169)

• • •

Before JUDGE JULIUS J. HOFFMAN,
September 18, 1953,
2:00 o'clock, p.m.

• • •

ROBERT SIMMONS,

the Defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

[Tr. 45]

DIRECT EXAMINATION

BY MR. MILGROM:

Q Will you state your name, please?

A Robert Simmons.

Q You are the defendant in this case?

A Yes, sir.

Q Where do you reside?

A 1400 - 16th Street, North Chicago, Illinois.

Q How old are you?

A 26.

Q Are you single or married?

A Married.

Q What is the name of your wife?

A Delpha Simmons.

Q Is she present in the court room?

A Yes.

Q Will you point her out, please?

A The first one on the bench.

Q The first in the second row, right?

A Yes, sir.

Q Wearing a blue dress?

A A blue dress, yes, sir.

Q When were you married to her?

A March 5, 1949.

[Tr. 46]

Q What is your vocation?

A I am a minister.

Q Have you any other activity?

A Yes, I clean upholstery and wash automobiles to maintain myself in the ministry.

Q Are you an ordained minister?

A Yes, I am an ordained minister.

Q When were you ordained?

A October 28, 1951.

Q Who appointed you?

A One of the representatives of the Watch Tower Bi-

ble and Tract Society.

Q What is the Watch Tower Society?

A It is the governing body of Jehovah Witnesses.

Q Are you registered with the local draft board?

A Yes, sir.

Q What is the number of that board?

A Local Board No. 150.

Q And its address?

A 220 North Sheridan Road, Waukegan, Illinois.

Q Did you file a conscientious objector form, 150, with that board?

A Yes, sir, I did.

Q Did you therein claim, by reason of your religious

[Tr. 47]

principles and beliefs, to be conscientiously opposed to war in any form?

A Yes, sir.

Q Did you therein claim to be a conscientious objector to any combatant or non-combatant service in the armed services?

A Yes, sir.

Q What kind of classification did you receive from your local board?

A 3-A and 1-A.

Q Approximately when were you so classified in 1-A?

A June, 1945.

Q When was the last time your local board classified you 1-A?

A November 26, 1951.

Q And you asked for a hearing in regard to the classification in writing within ten days from November 26, 1951?

A Yes, sir.

Q Did you get such a hearing?

A Yes, I did.

Q When was such a hearing held?

A On December 10, at 8:00 p.m.

Q What year?

[Tr. 48]

A 1951.

Q Where was such hearing held?

A At the local board, 150 - 220 North Sheridan Road, Waukegan, Illinois.

Q Who was present at the hearing?

A Mr. Reardon, a clerk, and board member, and three other board members.

Q Will you please tell the Court what was said at that hearing.

A At that hearing, I furnished evidence in support of my ministry. I told them that I started preaching as an unordained minister in December, 1950. In October, 1951, I was ordained as a minister and that had been my regular vocation since that time.

I placed a booklet with each of the board members. One of the board members asked me how much education I had, and I told him eight years in the grade school and two years of high school. He told me that his minister had to go to school for years and years before he could qualify in the ministry.

I told the board that Christ Jesus and his Apostles were called unlearned and ignorant men. The board members told me that was all, and that I could go.

Q That is all you can remember as to what was said

[Tr. 49]

at the hearing?

A Yes.

Q Did your local board, after this hearing, reopen or change your 1-A classification?

A No.

Q When were you notified that they were not reopening or changing your classification, 1-A?

A I received a letter on December 12th to that effect.

Q Did you file an appeal in writing within ten days after December 10, 1951?

A Yes, sir, I did.

Q Did you have a conscientious objector hearing be-

fore Roy West?

A Yes, sir.

Q On what date did that hearing take place?

A On August 28, 1952.

Q At what time of the day?

A Approximately 9:45 a.m.

Q What was the place of the hearing?

A It was on the fourth floor of this building, the court house here in Chicago.

Q Who was present at that hearing?

A Mr. West, my wife, and myself.

Q Will you tell the Court what was said at the hearing?

[Tr. 50]

A Yes. Mr. West said that he had my file, and also the F.B.I. report concerning my case. He also said in the report it was reported that I was hanging around pool rooms.

He asked me: "Do you do that now?" And I told him no. I asked him what else was in the report. Mr. West started to tell me then about how long he had been in the law business with some large firm here in Chicago, and that he knew all of the Justices in the Supreme Court.

He asked my wife how she was feeling, and how was I treating her. My wife said "Fine." He said he was going to recommend me for ministerial status to Washington, but that he did not have the last word on it, that Washington had the last word.

Q Do you recall now that that was all that was said?

A Yes, sir.

Q Now, how were you classified after the last hearing on your appeal?

A 1-A.

Q After such classification, did you file any additional papers with your local board?

A Yes.

Q I show you what has been offered in evidence as

[Tr. 51]

Government's Exhibit 1-W. Will you read it, please?

A (Reading):

"To Whom it may concern:"—

Q No, just read it to yourself. Did you file that letter on January 20, 1953, with your local board, 150?

A Yes, I did.

Q And now, that affidavit which is in letter form purports to be signed by Charles K. Fetter, M. D. Who is he?

A He is superintendent or head doctor at the Lake County Tuberculosis Sanitarium in Waukegan, Illinois.

THE COURT: What is the point of that inquiry? Here is a defendant who is not asserting any defense here other than the fact that he is an ordained minister and a conscientious objector.

MR. MILGROM: He is, your Honor.

THE COURT: Is there a matter of dependency involved there?

MR. MILGROM: Yes, sir.

THE COURT: Special dependency?

MR. MILGROM: Because of her poor physical condition requiring his care.

THE COURT: Was she in the hospital at that

[Tr. 52]

time?

MR. MILGROM: Yes, she was. I will bring that out.

BY MR. MILGROM:

Q With whom did you file Government's Exhibit 1-W?

A With Mr. Reardon, the clerk at the local board.

Q That was on January 20, 1953?

A Yes, sir.

Q At what time approximately in the day was that?

A It was between 10:00 and 11:00 a.m.

Q Who else was present when you gave it to him?

A There were two lady employees of the local board.

Q At that time, what did you tell Mr. Reardon?

A I told him that I was going to ask, or I would like to ask the board to reconsider my reclassification, and that

the doctor had given me an affidavit concerning my wife's physical condition.

THE COURT: Did you say you wanted him to consider your reclassification? You were never reclassified.

THE WITNESS: No, I wanted him to open my classification.

THE COURT: Were you reclassified? You mean you wanted him to reconsider your classification 1-A?

[Tr. 53]

THE WITNESS: Yes, sir.

THE COURT: You were never reclassified?

THE WITNESS: No, sir.

THE COURT: When you said reclassification, you didn't mean that?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. MILGROM:

Q You mean you wanted the board to reopen your classification?

A Yes.

Q That is what you told Mr. Reardon? At that time?

A Yes, sir, it was.

Q What else did you tell him?

A I also told him that my wife—she just told me on January 16th the doctor visited her and said that an operation was necessary in view of a serious infected gland. I also told Mr. Reardon that prior to that she had had eight ribs removed from the left side, and that when she was discharged from the hospital she will be totally dependent on me for care, care that no one else could give her.

Q What did he say?

[Tr. 54]

A He said that when the board met, they would consider the letter. That was all that was said.

Q Did you have any conversation with Mr. Reardon at any later time regarding your local board's reopening your Selective Service classification of 1-A?

A Yes, on February 2nd.

Q What year?

A 1953.

Q Where did that conversation take place?

A At local Board 150, 220 North Sheridan Road, Waukegan.

Q Who else was present besides you and Mr. Reardon?

A No one else.

Q What time of the day was this?

A It was 8:30 a.m.

Q What was said at that time?

A I asked Mr. Reardon when was the board going to meet to consider the reopening of my classification, and to consider the affidavit that the doctor had signed for me, and Mr. Reardon told me: "We are not going to consider that."

I asked Mr. Reardon what he—"what is supposed to happen to my wife when she gets out of the hospital?"

Mr. Reardon said, "That is your business. That is no

[Tr. 55]

concern of ours." So I left after that.

Q Did you communicate with any other agency of the Selective Service?

A Yes, I did.

Q That is relative to reopening your classification because of your wife's need for your care?

A Yes, sir.

Q With whom did you so communicate?

A With the State Director, Paul G. Armstrong, and the General Director, General Hershey.

Q How did you communicate with them?

A By writing.

Q On what date did you write each of those gentlemen?

A On February 3rd.

Q What year?

A 1953.

Q I show you what has been marked and offered in evidence as Government's Exhibit 1-Q. Will you look at it? Will you read that?

A Out loud?

Q Yes, please.

A (Reading):

"To Whom it may concern:

"Mrs. Delpha Simmons, wife of Robert Simmons,

[Tr. 56]

draft board registrant, is confined to the Lake County Tuberculosis Sanatorium for treatment of advanced pulmonary tuberculosis.

"Robert Simmons is the sole support of this patient and she will be dependent upon him for care when she is able to leave the hospital.

"Very truly yours,

"Charles K. Fetter. M. D."

Q That bears what date?

A That is dated February 3, 1953.

Q You sent a copy of this exhibit to both Mr. Armstrong and Mr. Hershey?

A Yes, sir, I did.

Q In the letter you sent to them, you requested their assistance in getting your classification of 1-A reopened?

A Yes, sir.

Q To your knowledge, did either the state or the national Selective Service director direct a reopening of your classification?

A No.

Q When after February 3, 1953, the date of that

[Tr. 57]

Government's Exhibit 1-Q did your wife for the first time leave the Lake County Tuberculosis Sanatorium?

A The second week in August, 1953.

Q Where did she go on so leaving the sanatorium?

A To our apartment at 1400—16th Street, North Chicago, Illinois.

Q Is there anybody living in that apartment besides yourself and wife now?

A No, sir.

Q Specifically what have you done in the care of your wife since she returned from the sanatorium?

A I do all the housework, and I have to do the shopping for groceries, prepare all meals and fix her medicine and nurse her during the night.

Q Why did you refuse to submit to induction on February 9, 1953?

A I refused to submit to induction because under the law I should have had a minister's classification, or at least 1-O in view of my conscientious objection not to participate in war in any form.

And I also thought that the board would reopen my classification due to my wife's serious condition that required my constant care after she was discharged from the hospital.

[Tr. 58]

Q Now, with regard to your conscientious objector belief, how did you acquire that belief?

A By studying the scriptures and attending the theocratic minister's school of Jehovah's Witnesses.

Q You started that approximately when?

A In the spring of 1950.

Q And you state that you have been a minister, ordained—an unordained minister commencing in 1950, then you were ordained October 28, 1951?

A Yes, sir.

Q Does your ministerial status have any connection with your conscientious objection situation?

A Yes, sir, that is the sole reason of my conscientious objection status, that of the ministry, my studying the scriptures.

The Scriptures say, "Thou shalt not kill."

When a person has made a covenant to do God's will for the rest of his life, as I have, he cannot lay that covenant aside to engage in any conflict between nations.

If I was to go into the Armed Forces, that would put restrictions upon that covenant that I have made.

Q How long have you had such a view with regard to [Tr. 59]

being against war?

A Since the spring of 1950.

Q You acquired that during your study of the Bible?

A Yes, I did.

MR. MILGROM: Your witness.

CROSS EXAMINATION

BY MR. PARSONS:

Q I show you, Mr. Simmons, Government's Exhibit 1-D which is in evidence, which is the Selective Service classification questionnaire, and ask you if you recognize that document.

A Yes, I do.

Q Did you fill out the answers that appear on that document?

A Yes.

Q Is that your signature that appears at the end of page 7 of that document?

A That is true.

Q Did you intend to leave off your signature on Series 14 to be found on page 7 of that document at that time?

A Series 14?

Q Yes.

[Tr. 60]

A That is true.

Q You recall that Series 14 is a question which allows you to indicate to the local board whether or not you claim conscientious objection to war?

A Yes, sir.

Q You did not fill it out at that time, did you?

A No, not in the year of 1948.

Q Did you at that time place this figure, 1-A, on this classification questionnaire in ink?

A Yes, I did.

Q In answer to the question:

"In view of the facts that are set forth in this questionnaire, it is my opinion that my classification should be class 1-A."

A Yes, sir, in 1948 I did.

Q I show you now Government's Exhibit 1-C which is in evidence. You recall that exhibit, do you not?

A Yes.

Q You filled out the answers that appear on that exhibit, did you not?

A Yes.

Q Now, you signed it at both page 1 and page 4, did you not?

[Tr. 61]

A Yes, I did.

Q Do you recall the date on which you filed your special form for conscientious objection?

A No, I don't remember the exact date.

Q Let me show you this exhibit again.

Do you recall that date?

A Yes, two days after I was ordained as a minister, October 30th.

Q Do you recall the date on which you received your first 1-A classification?

A No, I do not. I do not exactly remember this 1-A classification.

Q Do you recall approximately when you were first classified 1-A?

A I believe it was 1951.

Q Was it before you filed the 150 form, or after?

A I believe it was before.

THE COURT: Let me get that clear. He was classified 1-A before he filed the conscientious objector form, is that right?

MR. PARSONS: Yes.

BY MR. PARSONS:

Q Do you recall whether it was a short time before you filed the form?

[Tr. 62]

A No, it was quite a while before.

MR. MILGROM: As a matter of fact, the Selective Service record indicates that he received his first 1-A on December 23, 1948, the first entry on the minutes.

BY MR. PARSONS:

Q When you reported to the local board for your hearings, Mr. Simmons, you appeared alone, is that right?

A That is true.

Q At that time had you sent anything else to your file other than the classification questionnaire and the 150 form questionnaire?

A Will you repeat that, please?

Q Had you sent to the local board any other material besides the questionnaire, and the 150 form questionnaire before you appeared before the board?

A No, sir, not at that time.

Q That is all the literature they had on you at that time, is that true?

A Yes, sir.

Q You were allowed to go into the board meeting and explain your position; is that what you said?

A Yes, to a certain extent.

Q At that time, you stated you wanted to be a conscientious objector?

[Tr. 63]

A I did not state I wanted to be a conscientious ob-

jector. I said I was an ordained minister, and I had begun to preach as an unordained minister.

Q Did you understand at that time that it was not necessary to be an ordained minister to be a conscientious objector?

A I was just stating the facts as they were. I did not know anything about the law.

Q Did you tell the draft board that it was your impression that a minister is automatically classed as a conscientious objector?

A I told them I wanted to be classified as a minister because at that time I was a minister.

Q When you filed your 150 form, were you applying to be classified as a minister or as a conscientious objector?

A When I filed the 150 form, I had been preaching as an unordained minister up to that time.

Q Did you file the 150 form in an effort to seek conscientious objector classification, or in an effort to seek ministerial classification?

A Ministerial classification.

Q Did you ask the local board for the conscientious objector form yourself?

[Tr. 64]

A Yes, I did.

Q Let me show you Government's Exhibit 1-C again, which is in evidence. Did you read it carefully when you filled out the answer to it?

A I did not read it too carefully, but I read most of it you might say.

Q Did you, in filling out these answers, believe you were applying for ministerial classification?

A Will you repeat that question?

Q When you filled out the form, did you think you were applying to be a minister, or did you think you were applying to be classified as a conscientious objector?

A I thought I was applying for a minister's classification.

Q But you saw nothing on the form which indicated that you desired a minister's classification, did you?

A Nothing on the form, no, just a conscientious objector.

Q So that when you appeared before the board, you told the board you wanted to be a minister, didn't you?

A Yes, sir.

Q You didn't tell them you wanted to be classified as a conscientious objector?

[Tr. 65]

A I didn't tell them I wanted to be a minister. I told them that I was a minister.

Q You did not tell them you wanted to be classified as a conscientious objector?

A Naturally I wanted, yes, to be classified as a conscientious objector.

Q Well, which did you want, a conscientious objector or minister's classification?

A As a minister, I was a conscientious objector.

Q Didn't you know at that time there were many ministers in the Service that were not conscientious objectors?

A Yes, I did.

Q Did you have the impression at that time that to be a minister you had to be a conscientious objector?

A Will you repeat that?

Q Did you have the impression that in order to be a minister, you had to be a conscientious objector to war?

A Yes, in my case, personally, yes.

THE COURT: Did you mean what you said, Mr. Parsons? I think you rather misspoke yourself. What were you trying to elicit from the witness?

MR. PARSONS: The point I wanted to draw is whether or not he understood that it is not necessary for a minister to be a conscientious objector.

[Tr. 66]

THE COURT: Yes, that it did not follow be-

cause the man was engaged as a clergyman that he was necessarily a conscientious objector.

MR. PARSONS: Thank you, your Honor. That is a better wording of the question.

BY MR. PARSONS:

Q You understood at that time that it did not follow that a man who was a minister had necessarily to be a conscientious objector, did you?

A Well, all ministers do not make covenants between God and themselves.

Q What was your understanding at that time?

A At that time, I had my covenant, and I was to be a faithful captain of that covenant. If I was to turn either way, then the Scriptures at Romans 1:31, which would have applied to me, means that covenant breakers would be worthy of death.

Q Did you at that time appear before the local board to give any information concerning your conscientious objection, not concerning your ministerial situation?

A Just at that hour?

Q Yes.

A I placed a book with each member of the board entitled "God and the State."

[Tr. 67]

Q Is that book you placed there concerning ministerial objection or conscientious objection to war?

A It was a book dealing with each individual, no matter where he might live or whatever walk of life he was in, that booklet had some bearing or effect on his destiny.

Q Did it have any bearing or effect on your ministerial claim, or did it have any bearing or effect upon your conscientious objector position?

A I would say it had an effect on both.

Q Which claim were you asserting at that time?

A The ministerial claim.

Q You had filed the form 150, is that right?

A That is right.

Q You had not stated on your classification questionnaire that you were a conscientious objector, had you?

A The classification questionnaire in 1948?

Q Yes, you had not stated on that questionnaire you filed that you were a conscientious objector, had you?

A No, not in 1948.

Q You had stated at that time that you thought your classification should be 1-A, isn't that correct?

A Yes, sir, in 1948.

Q And at that time, you had filed the 150 form in

[Tr. 68]

addition to the classification questionnaire which you had presented to the board, isn't that correct?

A Yes.

Q Then when you had this hearing, you *proceeded* not to tell about your conscientious objection, but about your ministerial classification, isn't that correct?

A That is true.

Q The board gave you an opportunity to make a full statement, did it not?

A No.

Q There didn't anybody tell you to shut up?

A No, sir, they didn't tell me to shut up, but the board members indicated they were pressed for time because another fellow had to have a hearing that night.

Q They did not cut you short in the midst of your ministerial statement, did they?

A Yes, they said that was all, and I could not do it.

Q Before they told you that was all, they had given you a chance to explain your position, is that right?

A To a limited extent.

Q Didn't you say on direct examination you told them you were a minister?

A I did.

Q Didn't you testify a moment ago that you gave them

[Tr. 69]

a book they could look at?

A A booklet, yes.

Q So that you were given an opportunity, weren't you, to explain your position?

A Well, when the question arose about my education, I told the board members what education I had. One of the board members told me I didn't have enough education to qualify as a minister, and that his minister had to go to school years and years before he could qualify.

When I told him that Christ Jesus and his Apostles were called unlearned and ignorant men, they told me that was all, and I left.

Q Now, let us look at this hearing before the hearing officer.

Incidentally, when you were retained in the classification by the local board, you did not apply for an appeal, did you?

A Yes, I did.

Q You were granted an appeal?

A Yes, I was granted an appeal.

Q In the course of your appeal, you were given a hearing before the hearing officer, were you not?

A Yes, sir.

Q You were allowed to bring as many witnesses as you

[Tr. 70]

wished to your hearing, were you not?

A Well, I did not know that until now.

Q You did bring witnesses, did you not?

A I brought my wife, yes.

Q Weren't you sent a statement of notification of the hearing?

A Yes, I was.

Q Didn't that statement tell you to bring witnesses with you?

A I am not sure if it did or not now.

Q It was a mimeographed statement, was it not?

A I don't exactly remember.

Q It gave you some time in which to get ready for the hearing, did it not?

A Yes, it did.

Q How long do you remember the time was between when you received it and when you were before the Board?

A I don't exactly remember when I received it, but I do remember that at one time—

Q Would you say it was at least a week?

A Well, I would say yes, at least a week.

Q When you appeared, Colonel West ushered you into the hearing room, did he not?

A Yes, sir.

[Tr. 71]

Q He sat down?

A Yes, he did.

Q He took his time, did he not?

A Yes.

Q And he asked you questions?

A No.

Q Didn't he ask you questions?

A Well, he asked me one question.

Q And you answered the question that he asked you, did you not?

A Yes, I did.

Q He allowed you to volunteer some statements, did he not?

A I didn't know if I could volunteer some statements. I gave him one—

Q Did he ask your wife questions?

A Yes, he did.

Q She was your witness at that time?

A Yes.

Q And then you were notified, were you not, eventually, that you were classified 1-A by your Appeal Board, isn't that correct?

A Yes, sir.

Q When did you receive, Mr. Simmons, your order to

[Tr. 72]

report for induction, following that interview?

A January 6, 1953.

Q Now, you received the notice to report for induction on January 6. When did you first file with your board any claim of dependency?

A After I found out the seriousness of my wife's condition.

Q Do you remember the date?

A The date was January 16th.

Q You received your notice to report for induction on January 6, is that right?

A Yes, sir.

Q Then you filed a petition to be classified as a person with a dependent on January 16th, isn't that correct?

A On January 16th I found out the seriousness of my wife's condition.

Q When did you file your application for that classification?

A On January 20th.

Q That was 14 days, was it not, after you received notice to report for induction?

A Yes, it was.

MR. PARSONS: May it please the Court, the
[Tr. 73]

Government would like to ask the Court to take judicial recognition of a certain provision. I would like a moment to find the provision which provides a meeting of the local board—

MR. MILGROM: If you are going to argue, argue later.

THE COURT: I do not conceive that this is argument. I assure you if it is we won't continue it. Is this argument?

MR. PARSONS: Not at all.

THE COURT: Have you finished with the witness?

MR. PARSON: I am not finished. I just wanted

to make that point at this particular time.

THE COURT: All right, you may make it.

MR. PARSONS: There is a Selective Service regulation which states that a local board may not open up a classification after sending out a notice for induction, and that regulation ties in with the fact that the registrant was thereupon advised to confer with General Hershey.

THE COURT: What is the purpose of the motion?

MR. PARSONS: To show that the defendant

[Tr. 74]

should have been classified under Mr. Hershey's classification.

THE COURT: Counsel I think is right there. That is argument which you may make later. That goes to the guilt or innocence of the defendant.

MR. PARSONS: I can understand—

MR. MILGROM: I am asking, to keep the record straight, that that regulation—

THE COURT: We won't go into it.

MR. MILGROM: I didn't think it was the correct thing to do, that he wanted you to take judicial notice of it.

THE COURT: I have sustained your objection, not because it is the law or isn't the law, but because your reference to it at this time is not in order, Mr. Parsons.

By MR. PARSONS:

Q Now, Mr. Simmons, what was the date on which that order to report for induction—what was the date for reporting that was on the order to report for induction?

A The date for reporting was January 19.

Q Did you report on that day?

A Yes, I did.

[Tr. 75]

Q Did you take the physical examination on that day?

A Partial physical, yes.

Q Were you inducted on that day?

A No, sir.

Q What happened?

A They had not finished my physical examination, and I was to come back on the 23rd of January.

Q Did you return on the 23rd of January?

A Yes, sir, I did.

Q At that time, had they completed the physical examination?

A They gave me a further examination at that time.

Q Were you told to return at a later date?

A Yes, sir, I was told to return on the 27th of January.

Q Did you return at that time?

A Yes, I did.

Q Had they completed the examination?

A As far as I know, they had completed the examination but they could not find my record.

Q Did they order you to report at a later date?

A The surgeon there at the record station told me to call back to see if my records had been returned from 2040 Taylor Street, I believe it was.

[Tr. 76]

Q Did you do that?

A Yes, I did.

Q Had they returned?

A No, they had not returned when I called.

Q Were you then given another date to return?

A I was given a further date to call back by phone.

Q Did you call back?

A Yes, sir, I did call back.

Q Had they been returned on that date?

A No.

Q Were you given any further instructions at the induction station?

A Well, during that time, I went down to local board No. 150 to see Mr. Reardon, to ask him if it was all right

if I went to work for a week, because I did not have any money, and I needed to get some money. He told me that it would be all right for me to go to work, but to report back there to him on February 9th and he would give me a ticket to the induction station.

Q Did you report on February 9th?

A Yes, I did.

Q Did you get your ticket to the induction station?

A Yes, he gave me a ticket.

Q On what date were you told to report?

[Tr. 77]

A To report on February 9th.

Q To the induction station?

A Yes.

Q Had your examination been completed?

A Yes, sir, it had been completed.

Q After the completion of your examination, were you given an opportunity to become a member of the Armed Forces?

A Yes.

Q Did you submit to induction?

A No.

Q After not submitting to induction, were you given a further opportunity?

A Well, yes.

Q Before being given the opportunity, did anyone read a law or regulation to you?

A Well, I would say it was more of a shout than reading.

Q Did anyone in any way state the law or regulation to you?

A Well, I don't know if he was a lieutenant or captain or what, but I was offered an opportunity, yes.

Q That was at the induction station?

A Yes, sir.

[Tr. 78]

Q In Chicago?

A In Chicago, yes.

Q Then you were given another opportunity to submit to induction?

A I was only given two opportunities, one in the induction ceremony room and the other in the presence of the officer.

Q And the second time, did you again refuse to submit?

A Yes, I did.

• • •

• • •

GOVERNMENT'S EXHIBIT 1

(Selective Service File of Robert Simmons)

(Filed November 3, 1953)

[Immaterial portions of all printed, mimeographed, etc., form documents in this exhibit are omitted in printing. Handwritten or typewritten material is distinguished from printed-form wording by *italics*.]

SELECTIVE SERVICE SYSTEM

COVER SHEET

Name (Last) *Simmons* (First) *Robert* (Middle)
 Address *1448 Seymour* (City or town) *North Chicago*
 (County) *Lake* (State) *Illinois* Telephone Race *Negro*
 Selective Service Number *11 150 27 162*
 Date of Birth (Month) *Apr.* (Day) *8* (Year) *1927*

• • •

Local Board No. 150

Lake County

NOV 26 1948

220 No. Sheridan Road

Waukegan, Illinois

(Stamp of Local Board)

Date of registration *Sept. 10 1948*

Date of mailing Questionnaire *Dec. 6 1948*

Changes of Address:

1. (Number and street or R. F. D. number) *1400 16th St.*

(Date) *May 16, 1951* (City, town, or village) *North Chicago*
(Zone) (State) *Illinois*

• • •

Classification

Date	Class
<i>12-23-48</i>	<i>1A</i>
<i>JUN 4 1951</i>	<i>3A</i>
<i>OCT 22 1951</i>	<i>1A</i>
<i>NOV 26 1951</i>	<i>1A</i>
<i>FEB 5 1953</i>	<i>1A</i>

5601 ACC Audited C. C. C.

SSS Form No. 101

412

SELECTIVE SERVICE SYSTEM
REGISTRATION CARD

SSS Form No. 1

Selective Service Number *11 150 27 162 . . .*

1. Name (Last) *Simmons* (First) *Robert* (Middle)
2. Place of residence (City, town, village, or county)
North Chicago Ill.

• • •

3. Mailing address *1448 Seymour*
4. Name and address of person who will always know
your address (Name) *Mrs. Carrie Simmons* (Address)
Same
5. Date of birth (Month) *Apr* (Day) *8* (Year) *1927*
6. Place of birth (City, town, village, or county) *North Chicago* (State or country)
7. Occupation *Chauffer*
8. Firm or individual by whom employed *Civil Service*
9. Nature of business, service rendered, or chief product *Naval Training Station*

10. Place of employment or business (Number and street or R. F. D. number) (Town) *Great Lakes* (County) (State) *Ill.*

12. Were you ever rejected for service in the armed forces? Yes *X* . . . When? *1943*

13. Marital status: Single *X* . . .

I affirm that I have verified the foregoing answers and that they are true:

Robert Simmons

(Signature of registrant)

Description of Registrant

16. Color of eyes *Brown* Color of hair *Black* Complexion *Black* Height (approx.) *6 ft. 1 in.* Weight (approx.) *200* Race *Negro*

. . .

(Date of registration) *Sept 10, 1948* (Signature of registrar) *Nellie C. Woodard*

Registrar for local board (Number) *150* (City or county) *North Chicago* (State) *Ill.*

. . .

[Local Board Stamp]

(Stamp of the Local Board of jurisdiction as determined by item 2, front of card)

— — —

GOVERNMENT'S EXHIBIT 1A

SELECTIVE SERVICE SYSTEM INDIVIDUAL APPEAL RECORD

DEC 19 1951

(Local Board Date Stamp)

Name of registrant (Last) *Simmons* (First) *Robert* (Middle)

Selective Service Number *11 150 27 162*

Classified by local board in Class *I-A* until . . .

Date classified *November 26, 1951*

Forwarded on appeal taken by *Registrant*

Date forwarded to Appeal Board *December 19, 1951.*

H. J. Reardon

Member or Clerk of Local Board.

Minutes of Action by Appeal Board

Appeal Board *Northern District Panel N—XI* for the State of *Appeal Board Illinois DEC 21 1951 523 Plymouth Court Chicago 5, Illinois . . .* Classified in Class *1A* until . . . by the following vote:

Yes 3 No 0 (Date of classification by Appeal Board)
DEC 17 1952

R. L. Warner

Member or Clerk of Appeal Board.

. . .

SSS Form No. 120

GOVERNMENT'S EXHIBIT 1B

DEC 9 1948

[Local Board Stamp]

**SELECTIVE SERVICE SYSTEM
CLASSIFICATION QUESTIONNAIRE**

Selective Service No. *11 150 27 162*

Date of mailing *Dec. 6, 1948*

Date of birth: (Month) *April* (Day) *8* (Year) *1927*

Name: (Last) *Simmons* (First) *Robert* (Middle)

Address: (Number and street or R. F. D. route) *1448 Seymour*

(City, town, or village) *North Chicago* (Zone) (County)

Lake (State) *Illinois*

Local Board No. *150*

Lake County

DEC 6 1948

220 No. Sheridan Road

Waukegan, Illinois

(Stamp of Local Board)

Notice to Registrant

• • •

This questionnaire must be returned on or before *Dec. 16, 1948*

H. J. Reardon

Clerk or Member of Local Board

• • •

SSS Form No. 100

[Page 2]

• • •

Statements of the Registrant
Series I—Identification

• • •

1. My name is (print) (Last) *Simmons* (First) *Robert* (Middle)

2. In addition to the name given above, I have also been known by the name or names of *Bobby*

3. My address now is *1448 Seymour Avenue . . .*
(City, town, or village) *North Chicago* (Zone) (County)
Lake (State) *Illinois*

4. My telephone number now is (Town) *North Chicago*
(Exchange) *MAJ* (Number) *5116m . . .*

5. My Social Security number is (If none, write "None") *747-16-3539*

Series II—Present Members of Armed Forces

• • •

[Page 3]

• • •

Series III.—Prior Military Service

• • •

Series IV.—Officials Deferred by Law

• • •

Series V.—Sole Surviving Son

• • •

Series VI.—Minister, or Student preparing for the Ministry

• • •

1. (a) I (am, am not) *am not* a minister of religion
(b) I (do, do not) *do not* regularly serve as a minister.

• • •

[Page 4]

Series VII.—Family Status and Dependents

• • •

Series VIII.—Present Occupation

1. Every registrant must check each of the following boxes appropriate to his case and follow the instructions indicated.

• • •

- (b) I am now working in a nonagricultural occupation
X . . .

• • •

2. The job I am now working at is . . . *Chauffeur 3/c*
3. I do the following kind of work in my present job
(Be specific. Give a brief statement of your duties.): *I drive
taxis, trucks, and passenger cars*

4. In my present job, I am . . . (a) a regular or permanent employee, work for . . . other compensation X; I have worked 4 years in my present trade, and I (do, do not) *do* expect to continue indefinitely in it.

• • •

5. My employer is *United States Civil Service Commission, Public Works . . . Great Lakes Naval Training Center . . . Great Lakes, Ill.* whose business is . . .

6. (a) I was employed by present employer on (Date) *February 9, 1948*

- (b) I entered job described in Statements 2 and 3, this series, on (Date) *February 9th 1948*

[Page 5]

- (c) I am paid at the rate of \$1.18 per hour X . . .

- (d) I work an average of 40 hours per week.

7. Other business or work in which I am now engaged is *None . . .*

8. Prior work experience *4 years chauffeur experience*

. . .

Series IX.—Agricultural Occupation

. . .

[Page 6]

Series X.—Education

1. I have completed (Number) *8* years of elementary school, (Number) *0* years of junior high school, and (Number) *2 1/2* year of high school.

2. I (was, was not) *was not* graduated from high school.

. . .

Series XI.—Students

. . .

Series XII.—Citizenship

. . .

Series XIII.—Court Record

. . .

[Page 7]

Series XIV.—Conscientious Objection to War

. . .

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

(Signature) [left blank]

Series XV.—Physical Condition

. . .

Registrant's Statement Regarding Classification

. . .

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class 1A

• • •

Registrant's Certificate

• • •

I, *Robert Simmons*, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing (are, are not) *are* in my own handwriting.

Robert Simmons

(Signature or mark of registrant)

• • •

[Page 8]

• • •

Dates	Minutes of Actions by Local Board and Appeal Board	Vote	
		Yes	No
12-23-48	1-A C. A.—ESA . . . SSS 110 to Reg. 3	3	0
5-8-51	SSS 219 Mailed		
JUN 4 1951	Class 3A . . .		
JUN 6 1951	SSS Form No. 110 Mailed		
OCT 22 1951	1A . . .		
OCT 23 1951	SSS Form No. 110 Mailed		
Oct 30 1951	" " " 223 "		
NOV 26 1951	Form No. 62 Mailed		
NOV 26 1951	Class 1A . . .		
NOV 27 1951	SSS Form No. 110 Mailed		
Apr. 18, 1952	The Appeal Board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this		

section, (1626.25 of the Selective Service Regulations).

Dec 22 1952 SSS Form 110 mailed.

JAN 6 1953 SSS Form 252 mailed

GOVERNMENT'S EXHIBIT 1C

OCT 30 1951

[Local Board Stamp]

SELECTIVE SERVICE SYSTEM
SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service No. *11 150 27 162*

Name (Last) *Simmons*, (First) *Robert* (Middle)

Address (Number and street or R. F. D. route) *1400 16th St.*
(City, town, or village) *North Chicago*, (County) (State)
Ill.

OCT 25 1951

[Local Board Stamp]

This form must be returned on or before (Five days after date of mailing or issue) *Oct. 30, 1951*

* * *

Series I.—Claim for Exemption

* * *

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6(j) of the Selective Service Act of 1948.

(Signature of registrant) *Robert Simmons*

Series II.—Religious Training and Beliefs

1. Do you believe in a Supreme Being? Yes X . . .
2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation.

Romans 13: 1—States that Jehovah God and Christ Jesus are the higher powers and that I recognize them as the supreme powers. Peter at Acts 5: 29 admonishing all foot-step followers of Christ Jesus that "we must obey God rather than men."

Also Paul at 2 Cor. 4: 4 states Satan the Devil is the God of this system of things. Showing that we show obey the Creator rather than the Creation of God. Jehovah God in one of his Ten Commandments at Ex. 20: 13. "Thou shall not kill."

[Page 2]

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

In 1949 mid-November I started a Bible book study and became interested in Bible truths. As I progressed in this Bible study I wanted more & more to become a minister of the truth. My first contact was with Clarence Howze. I am now receiving my training from the Watchtower Bible & Tract Society.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

Clarence Howze, 968 Indiana St. Waukegan, Illinois

5. Under what circumstances, if any, do you believe in the use of force?

None whatsoever. Unless it be under the supervision of Jehovah God.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

In my course of conduct being a minister I regularly

spend an average of 45 hours a month in the service of Jehovah God.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where?

From House to House, and on the street in Waukegan, Illinois

Series III.—General Background

• • •

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended From-To-
<i>Commonwealth</i>	<i>Grammer</i>	<i>15th & Common- wealth No. Chg. Ill.</i>	<i>1933 1941</i>
<i>Waukegan township High</i>	<i>Waukegen, Illinois</i>		<i>1941 1943</i>

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked From-To-
<i>Shine Shoes</i>	<i>Central Shoe repair</i>	<i>3 So. Genesec</i>	<i>1943 1944</i>
<i>Shine Shoes</i>	<i>Ships Service</i>	<i>Great Lakes, Illinois</i>	<i>1944 1944</i>
<i>Truck Driver</i>	<i>Porett Bros.</i>	<i>112 Madison St.</i>	<i>1944 1945</i>
<i>Chauffeur</i>	<i>Civil Service</i>	<i>Fort Sheridan, Ill.</i>	<i>1945 1945</i>
<i>Chauffeur</i>	<i>Civil Service</i>	<i>Great Lakes Ill.</i>	<i>1945 1951</i>

[Page 3]

3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D.	Dates of Residence Route From-To
North Chicago, Ill.	Illinois	1448 Seymour Ave.	1927 1948
North Chicago	Illinois	1400 16th Street	1948 1951

4. Give the name and address of your parents and indicate whether they are living or not.

Carrie B. Simmons 1448 Seymour No. Chgo. Ill. Deceased

James H. Simmons 1448 Seymour No. Chgo. Ill. Living

5. (a) State the religious denomination or sect of your father *none that I know of—*

(b) State the religious denomination or sect of your mother *Baptist*

Series IV.—Participation in Organizations

• • •

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organization? (Yes or no) *Yes* If your answer to question 2 is "yes," answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Watch Tower Bible & Tract Society 117 Adams St. Brooklyn N. Y.

(b) When, where, and how did you become a member of said sect or organization? *Started attending meetings mid-November 1949 Kingdom Hall at 814 Belvidere St. Waukegan.*

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Kingdom Hall of Jehovah Witnesses 616 McAllister St.

Waukegan Ill.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

H. McClure Highland Park, Illinois

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

We are opposed to combat or noncombat service.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

None.

[Page 4]

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship
<i>Mr. Clarence Howze</i>	<i>68 Ind. Ave.</i>	<i>Janitor</i>	<i>None</i>
<i>Charles R. Gardner</i>	<i>2039 Wright St.</i>	<i>Waukegan</i>	<i>None</i>
<i>Everett Harris</i>	<i>Wadsworth Road</i>	<i>Waukegan</i>	<i>None</i>
<i>H. McClure</i>		<i>Highland Pk.</i>	<i>None</i>

Registrant's Certificate

• • •

I, *Robert Simmons*, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing (are, are not) *are* in my own hand-

writing.

Robert Simmons
(Signature or mark of registrant)

• • •

GOVERNMENT'S EXHIBIT 1D

**CHICAGO ARMED FORCES EXAMINING
INDUCTION & RECRUITING MAIN STATION**

615 West Van Buren Street
Chicago 7, Illinois
10 February 1953

Local Board No. 150
Selective Service System
220 North Sheridan Road
Waukegan, Illinois

Re: Simmons, Robert
SS# 11 150 27 162

Gentlemen:

The above named registrant reported to this station on 9 February 1953, for induction into the U. S. Armed Forces. Upon arrival at this station Mr. Simmons refused to be inducted.

In compliance with Paragraph 27b, Special Regulations 615-180-1, Department of the Army, dated 5 November 1951 letter as required explaining the action of subject registrant have been forwarded to the U. S. District Attorney, and the State Director of Selective Service.

Transmitted herewith are registrants DD Form 47 and other allied papers. Copy of above mentioned letter is also forwarded for your files.

Very truly yours,
[Signature]
Ralph D. Buswell
1st Lt. Armor
OIC, Induction Section

7 Incls.

1. Ltr U. S. District Attorney
dtd 19 Feb 53
 2. DD Form 47 (in quad)
dtd 19 Jan 53
 3. Std. Form 88 (in quad)
dtd 19 Jan 53
 4. Std. Form 88 (in quad)
dtd 14 Nov 51
 5. Std. Form 89
dtd 14 Nov 51
 6. DD Form 47
dtd 16 May 51
 7. DD Form 47
dtd 14 Nov 51
- FEB 13 1953
[Local Board Stamp]
-

GOVERNMENT'S EXHIBIT 1E

DEPARTMENT OF JUSTICE
Washington, D. C.
December 3, 1952

DEC 8 1952

[Appeal Board Stamp]

DEC 22 1952

[Local Board Stamp]

Chairman, Appeal Board, Northern
District of Illinois
Selective Service System
523 Plymouth Court
Chicago, Illinois

Re: Robert Simmons
S. S. No. 11-150-27-162

Dear Sir:

As required by section 6(j) of the Universal Military Training and Service Act, an inquiry was made in the above-mentioned case and an opportunity to be heard on his

claim for exemption as a conscientious objector was given to the registrant by Honorable Roy O. West, Hearing Officer for the Northern District of Illinois.

Registrant is twenty-five years of age, married, born in Illinois and has completed approximately two years of high school. At the present time he is employed as a chauffeur. He was first contacted by a member of the Jehovah's Witnesses Sect in November 1949, although the exact date of membership is not reflected.

The registrant believes in a Supreme Being and describes the nature of his belief by citing various parts of the Scriptures, in part, as follows:

"Romans 13:1— . . . that Jehovah God and Christ Jesus are the higher powers, and I recognize them as the supreme powers. Peter at Acts 5:29 admonishing all footstep followers of Christ Jesus that 'We must obey God rather than men.' Also Paul at 2 Cor. 4:4 . . . Satan the Devil is the God of this system of things. Showing that we show (sic) obey the Creator rather than the Creation of God. Jehovah God in one of his Ten Commandments at Ex. 20:13 'Thou shall not kill.'"

Registrant relates that in November 1949, at the suggestion of one Clarence Howze, he started a Bible book study and as he progressed wanted more and more to become a minister of truth. At the present time he is receiving training from the Watchtower Bible and Tract Society. As to the question regarding use of force he states "None whatsoever. Unless it be under the supervision of Jehovah God." He claims to engage in the work of his religion by preaching from house to house and on the streets.

At his present place of employment he has been seen reading the Bible during lunch hour and discussing same with a few co-workers. References, all of whom are members of the same sect, believe registrant is sincere, as do his neighbors. A confidential informant, of known reliability, reports that during the last seven or eight months regis-

trant was actively engaged in distributing pamphlets; that prior to that time registrant was personally known to him as a rather heavy drinker and crap shooter in and around local taverns and pool halls. This informant believes registrant is now sincere. Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed. It is to be noted that registrant is reported to have had a very poor home life.

Police records reflect that registrant was arrested May 29, 1950 on a complaint by his wife that he pulled her out of a car and hit her in the face—fined \$13.60; on June 12, 1950 police were called to settle a "hot argument" and on January 6, 1952, wife claimed registrant was abusive. Police settled last two matters so no charges were filed.

The file also reflects that registrant was mailed his questionnaire on December 6, 1948 and did not sign that part (series XIV) reserved for a conscientious objection. He was classified I-A on December 23, 1948 and married his present wife on March 5, 1949.

The Hearing Officer reports registrant impressed him as sincere but notes that his religious activities are coincident with pressing draft activities by officials and, therefore, recommends a I-A classification.

From the available information it appears that registrant had little, if any, religious training prior to November 1949 and it was not until after his 3-A classification was changed to I-A that he evidenced any conscientious objection. From the time he first attended a Bible study class until approximately October 1951, registrant had a little less than two years of Jehovah's Witness religious training. In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence towards his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952.

After consideration of the entire file and record, the

Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and non-combatant training and service be not sustained.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,
[Signature]

T. Oscar Smith
Special Assistant to the Attorney General

DEC 22 1952
[Local Board Stamp]

GOVERNMENT'S EXHIBIT 1F

10 February 1953

U. S. District Attorney
219 South Clark Street
Chicago, Illinois

Dear Sir:

In compliance with Paragraph 27b, Special Regulations 615-180-1, Department of the Army, dated 5 November 1951, the name and circumstances surrounding the refusal of ROBERT SIMMONS, 1400-16th Street, North Chicago, Illinois, Selective Service Number 11 150 27 162, who refused to submit to induction into the Armed Forces of the United States is hereby submitted:

ROBERT SIMMONS, was ordered to report for induction into the Armed Forces of the United States on Monday 9 February 1953 by Selective Service Local Board No. 150, whose address is 220 North Sheridan Road, Waukegan, Illinois. Mr. Simmons stated that because of personal religious beliefs he could not submit to induction into the Armed Forces of the United States. Mr. Simmons was

asked to make a signed statement in his own hand writing confirming his refusal to submit to induction which he did of his own free will. It was explained to the registrant that his refusal to submit to induction would constitute a felony under the provisions of Selective Service Regulations, and he was further informed that a conviction of such a nature would subject him to punishment of either five (5) years of imprisonment and/or a fine of not more than \$10,000.00 or both. 1st Lt. Ralph D. Buswell and WOJG Walter Kempa were witnesses to the registrants refusal to submit to induction.

This matter is being referred to your office for the necessary action.

Sincerely yours,
Earl Eubanks
Major USAF
Commanding

FEB 13 1953
[Local Board Stamp]

GOVERNMENT'S EXHIBIT 1G

SELECTIVE SERVICE SYSTEM ORDER TO REPORT FOR INDUCTION

JAN 6 1953

(Local Board Date Stamp with Code)

January 6, 1953

(Date of mailing)

The President of the United States,

To (First name) *Robert* (Middle name) (Last name)
Simmons (Selective Service Number) *11 150 27 162* (Street
and number) *1400—16th St.* (City) *North Chicago* (State)
Illinois

Greeting:

Having submitted yourself to a Local Board composed

of your neighbors for the purpose of determining your availability for service in the armed forces of the United States, you are hereby ordered to report to the Local Board named above at (Place of reporting) *220 N. Sheridan Road, Waukegan, Illinois* at (Hour of reporting) *3:00 P m.*, on the *16th* day of *January, 1953*, for forwarding to an induction station. *For instructions only. You will not leave for Chicago until the following Monday morning.*

• • •

H. J. Reardon

Member of Local Board

SSS Form No. 252

• • •

GOVERNMENT'S EXHIBIT 11

SELECTIVE SERVICE SYSTEM DELINQUENT REGISTRANT REPORT

FEB 13 1953

(Local Board Stamp)

(Date) *February 13, 1953*

TO: Hon. *Otto. A Kerner, United States Attorney.* (Address) *U. S. Court House, Chicago, Illinois*
House, Chicago, Illinois

1. Identification of Delinquent:

Full name of delinquent: (Last) *Simmons* (First) *Robert*
(Middle) . . . Last known address: (Number and street or
R. F. D. route) *1400 16th Street*, (City, town, or village)
North Chicago (Zone) (County) *Lake* (State) *Illinois*

Selective Service No.: *11 150 27 162*

Social Security No.: *347 16 3539*

Selective Service classification: *1-A*

Color of eyes: *Brown* Color of hair: *Black* Complexion:

Dark Height: *6'1"* Weight: *200* Race: *Negro*

Other obvious physical characteristics: *None*

Date of birth: (Month) *April* (Day) *8* (Year) *1927*

Place of birth: (City, town, county) *North Chicago* (State or country) *Illinois* Prior military service: *None . . .*

2. Offenses:

This delinquent failed to report for induction into the Armed Forces pursuant to . . .

In addition to failing to report for induction into the Armed Forces this delinquent has also failed to perform the following duties at the times indicated:

Duties	Dates
<i>Registrant refused to be inducted</i>	<i>9 February 1953</i>
SSS Form No. 301	

H. J. Reardon
(clerk of local board)

• • •

• • •

GOVERNMENT'S EXHIBIT 1Q

LAKE COUNTY TUBERCULOSIS SANATORIUM
WAUKEGAN ILLINOIS

• • •

RECEIVED
FEB 5 - 1953
STATE DIRECTOR
S. S. S. ILLINOIS
February third
1953

To Whom It May Concern:

Mrs. Delpha Simmons, wife of Robert Simmons, draft board registrant, is confined to the Lake County Tuberculosis Sanatorium for treatment of Advanced Pulmonary Tuberculosis.

Robert Simmons is the sole support of this patient and

she will be dependent upon him for care when she is able to leave the hospital.

Very truly yours,
[Signature]
Charles K. Petter, M. D.,

CKP:hf

Subscribed and sworn to before me this 3rd day of February 1953.

Lucille M. Tomasik
Notary Public

FEB 13 1953
[Local Board Stamp]

GOVERNMENT'S EXHIBIT 1R

Re: Simmons, Robert
SS 11-150-27-162

SELECTIVE SERVICE SYSTEM
STATE HEADQUARTERS
523 Plymouth Court
Chicago 5, Ill.

CJM:ks

COPY

11 February 1953

Mr. Robert Simmons
1400-16th street
North Chicago, Illinois

Dear Mr. Simmons:

This will acknowledge receipt of the carbon copy of your letter of 3 February.

We note from your letter you state you were ordered to report for induction 19 January 1953. The letter was not received in this office until 5 February.

We, therefore, cannot give any further consideration to the matter except to forward the affidavit relative to your

Government's Exhibit 1R

wife's condition to the local board of jurisdiction.

Yours very truly,
For the State Director
[Signature]
C. J. Magnesen
Lt. Col. Inf.
Classification Officer

cc: Local Board No. 150

FEB 13 1953
[Local Board Stamp]

GOVERNMENT'S EXHIBIT 1S

CHICAGO RECRUITING MAIN STATION
ILLINOIS USA & USAF RECRUITING SERVICE GROUP
615 West Van Buren Street
Chicago 7, Illinois

M/Sgt Irsyk/et
Date 29 January 1953

Local Board No. 150
Selective Service System
220 North Sheridan Rd.
Waukegan, Illinois

Re: Simmons, Robert
SS# 11 150 27 162
Exam 19 Jan. 1953 (Induc)

Gentlemen:

It is requested that the action indicated below in regard to subject registrant be taken at the earliest practicable date.

X Return Registrant without issuing new Form 261 to Operations Office, 4th Floor, with copy of this letter, for:

• • •

X Other (Explain) Please have registrant report directly to M/Sgt Irzyk—4th Floor-Induction Section for

completion of Induction Processing. DD Form 47's have been retained at this Station.

Sincerely yours,

[Signature]

Raymond L. Wilkinson

Captain, Infantry

Commanding

CRMS Form 109

(30 April 52)

GOVERNMENT'S EXHIBIT 1T

CHICAGO RECRUITING MAIN STATION

ILLINOIS USA & USAF RECRUITING SERVICE GROUP

615 West Van Buren Street

Chicago 7, Illinois

M/SGT. IRZYK/jt

Date 29 January 1953

Local Board No. 150

Selective Service System

220 N Sheridan Road

Waukegan, Illinois

Re: Simmons, Robert

SS# 11 150 27 162

Exam 19 Jan '53 (Induc)

Gentlemen:

It is requested that the action indicated below in regard to subject registrant be taken at the earliest practicable date.

. . .

XX Schedule Registrant for re-examination on new SSS Form 261.

XX Other (Explain) Registrant Previously Listed as "Holdover" on Date Scheduled for Induction. No Records

Government's Exhibit 1T

Can Be Located in This Station.

Sincerely yours,
[Signature]
Raymond L. Wilkinson
Captain, Infantry
Commanding

CRMS Form 109
(30 April 52)

GOVERNMENT'S EXHIBIT 1U

• • •

[Local Board Stamp]
JAN 22 1953

CORRESPONDENCE POSTAL CARD

Refer to your SS number in all communications 11 150 27 162

Please report to your Draft Board at once. Office hours are 8:30 A.M. to 5: P.M. Monday thru Friday.

H. J. Reardon

M. K.

(Signature of Local Board Member or Clerk)

SSS Form No. 390

GOVERNMENT'S EXHIBIT 1V

MEMORANDUM OF INFORMATION

To Be Filed in Cover Sheet of (Registrant's Name) *Robert Simmons*

(Sel. Serv. No.) *11-150-27-162*

Check source of Information: . . . (X) Over the Counter . . .

In the space below, write a summary of the information received: (If more space is needed, use the reverse side or attach extra sheets) *Registrant is H/O. Reported to Ind. Sta. 1-22-52 & reporting again 127-53.*

Date: *1-23-53* Information Received From: *Registrant*

• • •

GOVERNMENT'S EXHIBIT 1W

150-27-162

1A

LAKE COUNTY TUBERCULOSIS SANATORIUM
WAUKEGAN ILLINOIS

• • •

JAN 20 1953
[Local Board Stamp]
20 January 1953

To Whom It May Concern:

Mrs. Delpha Simmons, wife of Robert Simmons, draft board registrant, is confined to the Lake County Tuberculosis Sanatorium for treatment of Advanced Pulmonary Tuberculosis.

Robert Simmons is the sole support of this patient and she will be dependent upon him for care when she is able to leave the hospital.

Very truly yours,

[Signature]

Charles K. Petter, M.D.,

• • •

[Sworn Before Notary Public]

GOVERNMENT'S EXHIBIT 1X

RECORD OF INDUCTION

• • •

[Local Board Stamp]

JAN 19 1953

• • •

DD Form 47

• • •

Section VI—Induction Board Classification
(To be filled out at induction station)

23. I certify that the qualifications of the above named registrant have been considered in accordance with the current regulations governing the acceptance of Selective Service registrants and he was this date:

a. X Found acceptable for induction into the armed services

• • •

Date 9 Feb 53

Place Chicago, Illinois

• • •

RE-EXAMINATION

REPORT OF MEDICAL EXAMINATION

Standard Form 88

• • •

6. Date of examination 19 Jan 53

• • •

Remarks and additional detail defects and diseases
CLASS ACCEPTED

• • •

GOVERNMENT'S EXHIBIT 1Y

Concerning Reclassification

Robert Simmons SS# 11-150-27-162

As a ordained Minister of Religion

1A

Sirs:

Receive your letter stating that I am still in the class (1-A). Still being *unsatisfy* with it, would like to have my records stating that I am a minister of the true religion, and also the letters that were sent to you be brought up to the Board of Appeals for further consideration.

Gentlemen, much is said in the briefs both complimentary and derogatory to Jehovah's Witnesses. Whatever a draft board or a court, or any-body else for that matter, may think of them is of little consequence. The fact is, they

have been recognized by the Selective Service System as a Religious Organization, and are entitled to the same treatment as the members of any other religious organization. The Selective Service System has even more broadly defined the term "regular minister of religion" under the heading, "Special Problems of Classification". (Selective Service in Wartime). Second Report of the Director of Selective Service, 1941-1942, Pages 239-241, it is stated: "The ordinary concept of 'Preaching and teaching' is that it must be oral and from the Pulpit or Platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message from housetops 'or write it upon tablets of stone'. He may give his 'sermon on the mount', heal the eyes of the blind, or write upon the sands while a Magdalene kneels, wash disciples feet or die upon the cross. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his Religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. To be a 'regular minister' of religion, the translation of religious principles into the lives of his followers must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant."

A minister for eternal service
in the eyes of Jehovah God and
his son Christ Jesus.

Robert Simmons

[Local Board Stamp]

DEC 18 1951

GOVERNMENT'S EXHIBIT 1Z

DEC 11 1951

[Local Board Stamp]

December 11, 1951

Robert Simmons

1400 - 16th St.

North Chicago, Illinois

Dear Robert:

After considering the evidence submitted at the time of your Hearing, December 10, 1951, the local Board has determined the same insufficient for any reopening of your classification. Should you wish the case reviewed by the appeal board, you will please notify us within 10 days of the mailing of this letter.

Very Truly Yours

For the Local Board

[Signature]

H. J. Reardon, Clerk

HJR:bc

GOVERNMENT'S EXHIBIT 1AA

Concerning Reclassification

Of Robert Simmons

SS# 11-150-27-162

Sirs:

Both Minister and ambassadors serve their sovereign in an alien land. Jehovah's Witnesses of today are ministers and ambassadors of the Kingdom of Almighty God, his Theocratic Government under Christ Jesus. The time, energy and life of the Witnesses of Jehovah is dedicated exclusively to the service of Almighty God. As a minister of Jehovah God, I have made a covenant or contract with Almighty God to perform faithfully my God-given preaching activity as long as I live. Turning aside from that assigned duty, to engage in serving another master, to perform other

work assigned by the Civil State, or refraining from preaching because of compliance with arbitrary commands to stop, God has declared that Covenant-breakers are worthy of death. (Romans 1:31, 32.) I am in the army of Christ Jesus, serving as a soldier of Jehovah's appointed Commander, Christ Jesus. (2 Timothy 2:34.) The war weapons of the soldier of Christ Jesus are not Carnal, and is not authorized by his Commander to engage in Carnal Warfare of this World. Our weapons are the sword of truth or the Holy Bible, God's written word.

Today one of the leading members of the United Nations, namely the United States of America, has declared Jehovah's Witnesses to be a recognized religious organization, and that its ministers are exempt from training and service in the Armed Forces.

Jehovah's Witnesses keep their Neutrality and their covenant obligations as ambassadors for God's Kingdom, and they declare their reason for refusing to break their allegiance to Almighty God Jehovah. Gods word the Bible at (2 Corinthians 4:4.) tells us that Satan is the God of this world or system of things. James 4:4, tells us that a friend of the world is an enemy of God. We are told at (Zephaniah 2:3.) "Seek ye the Lord, All ye meek of the earth, which have wrought his *judgement*: Seek righteousness, seek meekness: it may be ye shall be hid in the day of the Lord's anger." While the world struggles in agony because of its woes, and while the message of God's Kingdom is a sore plague to Satans organization, Jehovah's Witnesses are glad and rejoice despite suffering for these see their deliverances near. Jesus said at (Luke 21:18.) "And when these things begin to come to pass, Then look up, And lift up your heads for your redemption draweth nigh." This is sure sign of the finish to the old system of things that cries peace, but is stricken with wars, Professes Godliness, yet seeks with *imorality* boasts of wakefulness while it is sound asleep. God's Kingdom by Christ Jesus is destined to end Man's every *Affliction* and Woes. Extension of its power to the earth inside this generation will be the

greatest blessing in Man's history. Gods Kingdom is the only hope for Mankind.

Yours Truly
Robert Simmons

GOVERNMENT'S EXHIBIT 1BB

CERTIFICATE OF ACCEPTABILITY

Last Name - First Name - Middle Name	Present Home Address
<i>Simmons Robert</i>	<i>1400 16th St. N Chgo, Ill.</i>

Selective Service Number *11 150 27 162*

Local Board Address *220 North Sheridan Rd Waukegan Ill.*

I certify that the qualifications of the above named registrant have been considered in accordance with the current regulations governing acceptance of Selective Service registrants and he was this date:

X Found acceptable for induction into the armed services

• • •

NOV 26 1951

[Local Board Stamp]

Date	Place	Typed or stamped name and grade of joint examining and inductions station commander
<i>14 Nov 1951</i>	<i>Chicago, Ill</i>	

Robert Baum, Maj 5102 ASU

Signature *Baum*

GOVERNMENT'S EXHIBIT 1CC

12-10-51

Registrant reported as scheduled at which time he offered evidence substantially the same as in Form 150 in file.

He made the statement he was seeking classification as a minister and *not* as a conscientious objector. The local board determined the evidence insufficient for any reopening of the 1A classification. The registrant was advised of his Appeal rights.

GOVERNMENT'S EXHIBIT 1DD

RECORD OF INDUCTION

• • •

23. I certify that the qualifications of the above named registrant have been considered in accordance with the current regulations governing the acceptance of Selective Service registrants and he was this date

a. X Found acceptable for induction into the armed services

• • •

Date *14 November 52* Place *Chicago Illinois*

• • •

GOVERNMENT'S EXHIBIT 1EE

May 31, 1951

Robert Simmons, 11-150-27-162
1400 - 16th Street,
North Chicago, Illinois
Dear Sir:

Your order to report for pre-induction physical examination on June 8th is hereby cancelled. When the Local Board has reviewed your file, you will be notified of your new classification.

Very truly yours,
For the Local Board
H. J. Reardon, Clerk

HJR/mi

GOVERNMENT'S EXHIBIT 1FF**SELECTIVE SERVICE SYSTEM****ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION****OCT 30 1951****(Local Board Stamp)****(Date of mailing) *October 30, 1951*****To (First name) *Robert* (Middle name) (Last name) *Simmons*****(Selective Service Number) *11 150 27 162***

You are hereby directed to report for armed forces physical examination at (Place of reporting) *220 N Sheridan Road, Waukegan, Illinois* at (Hour of reporting) *3:30P m.*, on the (Day) *13th* of (Month) *November, 1951.* *For instructions only. You will not leave for Chicago until the following morning.*

H. J. Reardon**(Member or clerk of Local Board)**

• • •

SSS Form No. 223**GOVERNMENT'S EXHIBIT 1GG****SELECTIVE SERVICE SYSTEM****ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION****MAY 25 1951****(Local Board Stamp)****(Date of mailing) *May 25, 1951******Cancelled 5/31/51 [Pencil note]*****To (First name) *Robert* (Middle name) (Last name) *Simmons*****(Selective Service Number) *11 150 27 162***

You are hereby directed to report for armed forces physical examination at (Place of reporting) *220 N. Sheridan Road, Waukegan, Illinois* at (Hour of reporting)

8:00 A m., on the (Day) 8th of (Month) June, 1951.

H. J. Reardon
(Member or clerk of Local Board)
• • •

SSS Form No. 223

GOVERNMENT'S EXHIBIT

(attached to Government's Exhibit 1C)

Robert Simmons
Registrant #11-150-27-162

To men of Selective Serve System!
Gentleman,

This is a written notice of appeal to the local board for a personal appearance regarding Registration—classification.

Evidently there is an over sight which must be corrected. In my request for personal appearance I would like to give further proof of my ministry.

Yours
Robert Simmons

DEC 3 1951

[Local Board Stamp]

Mailed SS 390 - Dec. 3, 1951. to Registrant to Report for Hearing 12-10, 1951 at 8:00 P.M M Koehler

GOVERNMENT'S EXHIBIT 2

REPORT OF MEDICAL EXAMINATION

Standard Form 88

• • •

CLASS ACCEPTED

• • •

FEB 9 1953

Inspection performed in lieu of new physical examina-

tion, per auth. D. A. Ltr AGSP-E 341. 8 23 June 1952.

Defects Discovered upon Inspection: "None"

• • •

77. Examinee (Check) X is qualified for Military Service

• • •

10 February 1953

U. S. District Attorney
219 South Clark Street
Chicago, Illinois

Dear Sir:

In compliance with Paragraph 27b, Special Regulations 615-180-1, Department of the Army, dated 5 November 1951, the name and circumstances surrounding the refusal of ROBERT SIMMONS, 1400-16th Street, North Chicago, Illinois, Selective Service Number 11 150 27 162, who refused to submit to induction into the Armed Forces of the United States is hereby submitted:

ROBERT SIMMONS, was ordered to report for induction into the Armed Forces of the United States on Monday 9 February 1953 by Selective Service Local Board No. 150, whose address is 220 North Sheridan Road, Waukegan, Illinois. Mr. Simmons stated that because of personal religious beliefs he could not submit to induction into the Armed Forces of the United States. Mr. Simmons was asked to make a signed statement in his own hand writing confirming his refusal to submit to induction which he did of his own free will. It was explained to the registrant that his refusal to submit to induction would constitute a felony under the provisions of Selective Service Regulations, and he was further informed that a conviction of such a nature would subject him to punishment of either five (5) years of imprisonment and/or a fine of not more than \$10,000.00 or both. 1st Lt. Ralph D. Buswell and WOJG Walter Kem-

pa were witnesses to the registrants refusal to submit to induction.

This matter is being referred to your office for the necessary action.

Sincerely yours,

EARL EUBANKS
Major USAF
Commanding

CHICAGO RECRUITING MAIN STATION
ILLINOIS USA & USAF RECRUITING SERVICE GROUP
615 West Van Buren Street
Chicago 7, Illinois

2/9/53

I refuse to be inducted into the Armed Services of the United States

/s/ Robert Simmons
/t/ Robert Simmons

Witnessed by:

Walter Kempa
/s/ WOJG USA

/t/ Walter Kempa
WOJG USA

/s/ Ralph D. Buswell
1st Lt. Armor

/t/ Ralph D. Buswell
1st Lt. Armor

The above statement in man's own handwriting

• • •

• • •

NOTICE OF APPEAL

(Filed September 28, 1953)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

(Caption—53 CR 169)

* * *

I

Name and address of appellant is Robert Simmons, 1400 16th Street, North Chicago, Illinois.

II

Name and address of appellant's counsel is Karl M. Milgrom, 19 South LaSalle Street, Chicago, Illinois.

III

Offense: A violation of the Universal Military Training and Service Act, by failure to submit to induction.

IV

The defendant was convicted upon a plea of not guilty of the above-described offense by a finding of guilty by the Court, and was sentenced and committed on September 18, 1953 to the custody of the Attorney General of the United States for a period of two years.

V

The above-named appellant hereby appeals to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Dated September 28, 1953.

Karl M. Milgrom
Counsel for Appellant

* * *

STATEMENT OF POINTS

(Filed October 23, 1953)

(Caption—53 CR 169)

• • •

Now comes the defendant-appellant in the above cause and states the points on which he intends to rely on the appeal.

One.

The trial court committed error in granting the motion to quash the subpoena duces tecum issued by the Clerk of that court at the request of the defendant, requiring the production at the trial of a certain Federal Bureau of Investigation investigative report submitted to Roy West, as Hearing Officer of the United States Department of Justice, in connection with the hearing conducted by said Hearing Officer relating to the conscientious objector Selective Service status of the defendant.

Two.

The trial court erred in overruling the motion for judgment of acquittal made at the close of all the testimony.

Three.

The trial court erred in sentencing the defendant.

Wherefore, defendant-appellant prays that upon appeal the trial court's judgment be reversed for each and every one of the reasons set forth in the above points upon appeal.

Karl M. Milgrom
Attorney for Defendant-Appellant

• • •



[fol. 76]

[Caption omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

No. 11011

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT SIMMONS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

DOCKET ENTRIES

Nov. 6, 1953. Filed Transcript of Record.

Nov. 6, 1953. Filed Appearance for Appellant. (K.M.
Milgrom)

Nov. 14, 1953. Filed election of counsel to print record.

Nov. 17, 1953. Filed Appearance for Appellee. (Otto
Kerner, James B. Parsons.)Nov. 20, 1953. Filed Appearance for Appellant. (Hay-
den C. Covington.)Nov. 20, 1953. Filed Original and 4 copies Petition and
Stipulation to extend time for Designation to Dec. 5, 1953.Nov. 24, 1953. Entered order extending time for Appel-
lant's Designation to Dec. 5, 1953.

Dec. 4, 1953. Filed Appellant's Designation.

Dec. 28, 1953. Filed 50 Copies printed record.

Jan. 14, 1954. Filed 30 Copies Appellant's Brief.

Feb. 17, 1954. Filed Original and 4 copies Motion and
Affidavit to extend time for Appellee's Brief to Mar. 22,
1954.Feb. 23, 1954. Entered order extending time for Appel-
lee's Brief to Mar. 22, 1954.Mar. 22, 1954. Filed Original and 4 Copies Motion and
Affidavit to extend time for Appellee's Brief to Apr. 15,
1954.Mar. 26, 1954. Filed Original and 4 Copies Answer to
Motion.

Mar. 26, 1954. Entered order extending time for Appellee's Brief to Apr. 5, 1954.

Apr. 5, 1954. Filed 30 Copies Appellee's Brief.

April 14, 1954. Filed original and 4 copies Motion to extend time for Reply Brief to Apr. 20, 1954, Affidavit.

Apr. 14, 1954. Entered order granting Motion.

Apr. 20, 1954. Filed 30 Copies Reply Brief.

Apr. 21, 1954. Heard and taken under advisement.

May 7, 1954. Entered order that Appellee's Supplemental Memo be filed nunc pro tunc as of May 4, 1954.

May 7, 1954. Filed 5 typed Appellee's Supplemental Memorandum nunc pro tunc as of May 4, 1954.

Apr. 23, 1954. Filed 4 typed Appellant's Supplemental Memorandum.

Jun. 15, 1954. Filed Opinion by Lindley, C. J.

Jun. 15, 1954. Entered Judgment Affirming.

Jun. 18, 1954. Filed Designation for Supreme Court Record.

[fol. 77] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT—October Term, 1953, April Session, 1954

No. 11011

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

ROBERT SIMMONS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

June 15, 1954

OPINION—Filed June 15, 1954

Before Major, Chief Judge, Duffy and Lindley, Circuit Judges

LINDLEY, *Circuit Judge*. Defendant was charged with willfully refusing to submit to induction into the armed forces of the United States in violation of the Universal Military Training and Service Act, 50 App. U. S. C. Sec.

462. He admitted that he had refused to submit, but averred that the induction order was void by reason of the invalidity of his selective service classification which denied his claim of exemption from service as a conscientious objector. This appeal followed a judgment of conviction entered by the court sitting without a jury.

We are faced with a situation where repetition of certain basic concepts may not be amiss. The issues before us, subject as they are to exaggerated emotionalism, are difficult for an impartial arbiter since they demand reconciliation of an apparent conflict between a paramount right of freedom of conscience and religion and an equally paramount duty of every individual to defend his sovereign nation. This conflict is ably discussed in *United States v. Izumihara*, 120 F. Supp. 36. Congress, as the legislative [fol. 78] voice of the sovereign, might have demanded unequivocal support from every person within its jurisdiction when it framed the selective service laws. As an obvious expression of conviction that greater strength lay in the preservation thereby afforded to freedom of conscience than in universal participation in the armed forces, Congress provided an exemption from military service to those who, by reason of their religious training and belief, are conscientiously opposed to participation in war. 50 App. U. S. C. Sec. 456 (j). This exemption, however, is an exception to a general statute applicable to "every male person" within a defined age group, 50 App. U. S. C. Sec. 453, 454 (a), and is, therefore, a privilege extended by legislative grace. To avail one of this privilege, application must be made to the agency established by the statute, the local board, which is empowered to decide each such claim of privilege, subject to administrative appeal as provided by statute. 50 App. U. S. C. Sec. 456 (j).

The task of probing into and intelligently appraising the conscience of another is a difficult and unhappy one; but we should bear in mind that Congress has imposed this onus not upon the courts but upon the local board whose orders "within their respective jurisdictions" are expressly made final "subject to the right of appeal to the appeal boards herein authorized." 50 App. U. S. C. Sec. 460 (b) (3). See *United States v. Adamowicz*, decided March 19, 1954 (N. D. Ill.). Judicial review of such orders is severely

restricted. *Estep v. United States*, 327 U. S. 114. Our duty is done if we be solicitous that our decision on the issues before us accords to the individual defendant due process of law without losing sight of the full purpose of the Act which Congress has determined to be in the best national interest.

The teachings applicable to the general field of administrative law are of little aid in judicial review of orders issued by the selective service agencies. The phrase "within their respective jurisdictions" employed in 50 App. U. S. C. Sec. 460 (b) (3) has been interpreted to limit finality of such orders to those which the administrative agency has jurisdiction to make. In the language of the Supreme Court, this jurisdictional question is reached by the court in any case "only if there is *no basis in fact* for the classification which [an administrative board] gave the registrant." (Emphasis supplied.) *Estep v. United States*, 327 U. S. 114, 122. [fol. 79] Though the scope of judicial review within the "basis in fact" concept lacks exact definition, certain definite conclusions follow from pronouncements by the court in *Estep* and subsequent cases. Obviously the burden is on the claimant to prove himself to be within the group entitled to claim the privilege. The court reviewing an order denying such a claim of privilege may not weigh the evidence. The selective service file may be scrutinized only for the narrow purpose of determining whether any factual basis supports the classification, and in its scrutiny the reviewing court may not require adherence by the administrative body to the niceties of judicial rules of evidence. When and if the court determines that the contested order rests on a basis in fact, its jurisdiction ends, even though the court be convinced that the order is erroneous. See generally *Estep v. United States*, *supra*; *Dickinson v. United States*, 346 U. S. 389; *Cox v. United States*, 332 U. S. 442; *Eagles v. Samuels*, 329 U. S. 304; *Eagles v. Horowitz*, 329 U. S. 317; *Gibson v. United States*, 329 U. S. 338.

Defendant contends, on authority of *Dickinson v. United States*, 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in

Weaver v. United States, 210 F. 2d 815, 822-823 (CA-8); *Schuman v. United States*, 208 F. 2d 801 (CA-9); and *Jewell v. United States*, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition.

Dickinson was convicted of refusing to submit to induction into the armed forces in violation of an order based on a selective service determination that he was not entitled to a claimed minister of religion classification. After reaffirming the "basis in fact" test of *Estep*, the court found no factual basis in the record to support the denial of the claimed exemption. The court said, 346 U. S. at 396-397: "The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. * * * However, Dickinson's claims were not disputed by any evidence [fol. 80] presented to the selective service authorities nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here. (The court then states that local boards are not bound by traditional rules of evidence and that courts may not apply a test of substantial evidence.) However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. * * * When the uncontradicted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concept of justice." Thus the court says that once a registrant has made out a *prima facie* case, which is not contradicted, a denial of the exemption claimed is without factual basis. We cannot apply this principle generally to every case without regard to the quality of the proof made by the registrant.

Furthermore, this language must be interpreted in the light of the claim and proofs made by Dickinson. Thus, a distinction must be drawn, we believe, between a claim of ministerial status and a claim of conscientious objection

status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as his principal vocation the leadership of and ministering to the followers of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, [fol. 81] not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based oftentimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may not inquire further as to the correctness of the board's order.

Conscientious objector cases cannot be rationalized as defendant's argument would have us do and as some courts seemingly have tried to do. Affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith. Each case must stand or fall on its own facts. Were this not true, the mass conversion of males, eligible for the draft, to particular faiths might be justified

merely because of the "hot breath of the draft board" on their necks. *United States v. Izumihara*, 120 F. Supp. 36, 41. Although this does not make every member of any sect suspect, the temptation present for those who would evade the draft is a factor which we should not foreclose the boards from considering on a claim of exemption. We could justify doing so under the Dickinson decision only on proof of a prima facie case for exemption, when the only conclusion possible on the record is that the denial of a claim of exemption is arbitrary and capricious. We could, under such circumstances, impose on the board the burden of making a record to support its order.

The uncontroverted evidence in the Dickinson case was that the draftee had been designated by the governing body of his sect, as a fulltime pioneer minister; that he was the presiding minister over a "Company" encompassing members residing in an area of some 5,000 square miles; that, as presiding minister, he devoted some 150 hours per month to missionary work; that he arranged and presided over some three or four meetings of his "Company" each week; that he instructed prospective ministers, and that his subsistence was derived from the benevolence of his followers and some five hours per week devoted to secular employment. The court found no evidence in the record to contradict this "prima facie" proof of a minister of religion status, and held that this factual proof could not be ignored by the board, in the absence of affirmative evidence to rebut it. The decision does not impose on the boards the burden of rebutting every claim made irrespective of the proof offered by the applicant. So to construe it would be to convert a privilege granted by legislative grace into an absolute right.

Applying these standards, is the order before us arbitrary and capricious, rendering appellant's classification void? We think not. In executing his classification questionnaire (SSS Form 100), appellant did not claim conscientious objector status. He stated that on the basis of "facts set forth in this questionnaire * * * my classification should be I-A." He was given a preliminary classification of I-A, in which he remained for some two and one-half years until June 4, 1951, when he was reclassified III-A (dependency).

On October 22, 1951, appellant was again classified I-A. On October 25, 1951, he requested SSS Form 150 to claim exemption from military service as a conscientious objector (I-O). On October 30, 1951, he was ordered to report for his preinduction physical examination. On the same day he filed Form 150, in which he stated that he was conscientiously opposed to either combatant or non-combatant military service; that his conscientious objection to such service grew out of beliefs acquired through a course of Bible study begun in 1949, under the direction of his sect; that he became a member in November 1949, and that he did not believe in the use of force except under the direction "of Jehovah God." Thereafter, he was given a hearing before his local board, which found the evidence insufficient to require reopening his classification. The appeal board, after submitting appellant's claim to the Department of Justice for investigation and hearing, by unanimous vote, rejected his claim and sustained his classification as I-A.

Defendant contends that the denial of his claim was based solely on the fact that he is a latecomer to his religious beliefs and that he did not assert his claim until some three years after registration, at a time when his induction was [fol. 83] imminent. We agree, as an abstract proposition, that the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status. However, we cannot subscribe to the view expressed in *Schuman v. United States*, 208 F. 2d 801, 805 (CA-9), that the board may never take this factor into account. See *Corrigan v. Secretary of the Army*, 211 F. 2d 293 (CA-9), in which defendant claimed he was converted to conscientious objection to war while listening to orientation instruction given immediately before induction. Espousal of certain beliefs coincident with pressing induction demands, when coupled with other evidence which casts doubt on the sincerity of an individual claimant, may well support an inference that the espousal of the religious belief was motivated not by conscience but by a desire to remain a civilian. We cannot close the door to the selective service board's use of any valid inference in ruling on classification questions. To do so would dis-

embowel the statute and refute the express congressional purpose in its enactment.

The government cites certain negative circumstances which it contends support the classification. Appellant did not assert his claim until some two years after he became a member of Jehovah's Witnesses and more than two and one-half years after he had been classified I-A, on his own statement that such classification was proper. His claim was supported only by his own statement. No other members of the sect appeared in his behalf. Affidavits of no other members were filed in his behalf. Considering his claim in the light of those of other members of the sect, as the board was entitled to do, on the evidence of record, we cannot say that its denial of his claim is without basis in fact. *United States v. Dal Santo*, 205 F. 2d 429, cert. denied 346 U. S. 858 (CA-7). The order may well have been erroneous, but on the record before us, excluding reference to the Department of Justice report, we cannot say that it is arbitrary and capricious.

The only evidence in the file not previously referred to is the report of the Department of Justice. Summarizing the F.B.I. investigative file, this report stated that appellant had on three occasions exerted physical violence against, and had abused, his wife, and that, until some seven months immediately preceding the F.B.I. investigation, appellant was reputed to be a heavy drinker and gambler. The Justice Department report stated in part: "The Hearing Officer reports registrant impressed him as sincere but notes that his religious activities are coincident with pressing draft activities by officials and, therefore, recommends a I-A classification. * * * In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence toward his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952." The point is that these evidentiary factors have a bearing on the question of sincerity. It is immaterial whether we would have concluded that the circumstances mentioned are sufficient to disprove appellant's sincerity.

Their presence of record precludes our saying that the challenged order is without basis in fact.

We thus reach the question of whether appellant was accorded due process of law. He contends that the standards of due process were violated in his hearing before the Department of Justice hearing officer and that this vitiates the induction order. No transcript of the proceedings before the hearing officer appears of record. At his trial, appellant testified that he asked that officer for information as to all unfavorable evidence contained in the F.B.I. investigative report; that he was informed that evidence in this report indicated that he had been hanging around pool halls and that he had been questioned about this facet of his behavior; that the hearing officer evaded his request relative to the other adverse evidence contained in his file, and that this evidence was not made known to him.

Before the trial, at appellant's request, a subpoena *duces tecum* issued to compel the United States Attorney and the Federal Bureau of Investigation to produce this file at his trial. On leave of court, the government moved to quash. Appellant filed an affidavit in opposition to the motion. Therein the contention which forms the basis for our inquiry was advanced, viz., that due process of law requires that a registrant be given a full and fair summary of the unfavorable evidence contained in the F.B.I. report employed by the hearing officer in making his recommendation, and that the report must be produced at a subsequent [fol. 84] trial of the registrant for refusing to submit to induction in order to enable the court to determine whether the officer has complied with the procedural requirements. The court granted the government's motion and quashed the subpoena.

Appellant contends that the Supreme Court in *United States v. Nugent*, 346 U. S. 1, established the rule that registrant must be accorded a full and fair resume of all adverse evidence contained in the F.B.I. file. In *United States v. Nugent*, 200 F. 2d 46, and *United States v. Packer*, 200 F. 2d 540, the Court of Appeals for the Second Circuit reversed the conviction of the defendants, holding that refusal of the Justice Department hearing officer to disclose the F.B.I. reports to defendants was a denial of

due process of law in the induction process which vitiated subsequent orders to submit to induction into the armed forces. On certiorari the Supreme Court reversed these decisions, saying, 346 U. S. at pages 5-6, "We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F. B. I. reports must be produced for their inspection."

A contention was made that the statute, so construed, was unconstitutional. Reviewing the statutory scheme for selective service procedures, the court held that the "hearing" accorded to claimants of conscientious objector status, though it must be more than sham, does not require a formal judicial hearing comparable to a criminal trial. The court said: "Instead, the word [hearing] takes its meaning * * * from an analysis of the precise function which Congress has imposed upon the Department of Justice in [Section 456 (j)]. The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice. * * * The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. * * * [I]n this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have [fol. 86] recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's 'appropriate investigation' nor its 'hearing' is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant. Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as

expeditiously as possible, to the appeal board. * * * It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruption.' *Falbo v. United States*, 320 U. S. 549, 554 (1944). Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the Constitution." (Footnotes by the court omitted.) 346 U. S. at 7-10.

Quotation at length from the Nugent opinion is justified, we think, as demonstrative that the court did not presume to establish rules of procedure for the conduct of Department of Justice hearings. Appellant refers us to the language of the court appearing at page 6, "We think the Department of Justice satisfies its duties under Sec. 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair resumé of any adverse evidence in the investigator's report." He contends that by this language the Supreme Court announced the postulate that a fair resumé is a prerequisite to a fair hearing. The government insists, correctly we think, that the only issue before the court, which is pertinent to the question before us, was as to the right to inspect the F.B.I. file and that the last quoted language is *obiter* occurring in approving the procedure followed by the hearing officer in Nugent's hearing.

The government's contention is persuasive when the [fol. 87] above quotations are considered together. Had the court intended to prescribe the minimum procedural rules for such hearings, it is not unreasonable to assume that it would have done so expressly in its discussion on the issue of constitutionality. There the court said that the hearing must be more than "sham" but need not be a "litigious controversy." Thus we are told that somewhere between these two extremes lies the line between due process and arbitrary action. We are told further that the procedure employed by the hearing officer in Nugent's case falls within

the realm of due process. It does not follow from this that the Nugent procedure presents the minimum safeguards which will afford the registrant due process. Furthermore, the court indicated that Nugent and Packer had waived their right to object to any failure on the part of the hearing officer to give them a full summary of the evidence because they had failed to request such a summary. 346 U. S. at 6, n. 10. Thus the issue now facing us was not before the court in *Nugent*.

We are referred to numerous authorities to support appellant's contention. Brief reference to some of them will suffice to dispose of the point. In *United States v. Everngam*, 102 F. Supp. 128, the court held that proof on the face of the report of the hearing officer that his recommendation was based on his own belief, not on his appraisal of registrant's sincerity in his professed belief, to be a denial of due process which vitiated any order based thereon. *Eagles v. Samuels*, 329 U. S. 304, approved the use of theological panels to advise the local board with respect to ministerial claims, provided the information received from the panel be placed in the registrant's file and available to him. *United States v. Balogh*, 157 F. 2d 939 (CA-2), reversed a conviction of a registrant whose classification followed a referral of a claim to what the court found to be an illegally constituted theological panel. In *United States v. Cain*, 149 F. 2d 338 (CA-2), the court held that concealment of the identity of the members of a theological panel from a registrant and adventures of such panel into questions outside of the field of ecclesiastics vitiated an order based thereon. The court in *DeGraw v. Toon*, 151 F. 2d 778 (CA-2), ordered a serviceman released from military custody where his local board had concealed from him damaging evidence in his selective service file on which his classification and induction rested. These authorities are relevant only for the basic postulate [fol. 88] on which each decision rests, namely, that a registrant is entitled "to know and confront the evidence" contained in his selective service file upon which his classification is based. *DeGraw v. Toon*, *supra* at 779, and to appear before a legally constituted advisory agency which will frame its advice on the standards prescribed by the statute.

In *United States v. Bouziden*, 108 F. Supp. 395, the court

held the failure of the hearing officer to inform a registrant of the adverse evidence on which his report and the Justice Department recommendation rested to be a denial of due process. And the Nugent case has been construed as requiring a full summary of adverse evidence contained in the registrant's F.B.I. file, *i.e.*, that failure of a hearing officer to give the registrant such a summary is a denial of due process which vitiates all subsequent proceedings in his case. *United States v. Evans*, 115 F. Supp. 340. This ruling has been followed in *United States v. Edmiston*, 118 F. Supp. 238; *United States v. Stull*, decided Nov. 6, 1953 (E. D. Va.); *United States v. Stasevic*, 117 F. Supp. 371; *United States v. Parker*, decided Dec. 2, 1953 (D. Mont.); and *United States v. Brussell*, Nov. 30, 1953 (D. Mont.). In each of these cases, however, the Evans decision has been adopted without analysis or evaluation. To the extent that these decisions hold that the registrant must be given an opportunity to know and rebut adverse evidence in his selective service file, which file must support a classification order if it is to survive judicial scrutiny, they merely restate accepted principles of due process in selective service cases. Since the F.B.I. file is no part of a registrant's selective service file, the holding in the Evans case that only a full summary by the hearing officer will satisfy due process requirements is, we believe, predicated on error in at least two respects. First, the decision is expressly premised on the postulate that, in a trial for the offense of refusing to submit to induction, the government has the burden of proving the validity of the classification on which the induction order is based. We consider this premise wholly inconsistent with the limited scope of judicial review permitted under the principle announced in *Estep v. United States*, 327 U. S. 114. Secondly, we cannot agree, as we have previously pointed out, with an interpretation of the Nugent case as establishing a full summary as an absolute criterion for measuring the legality of the Justice Department hearing.

[fol. 89] The line between "sham" and a "litigious proceeding" should, we believe, be drawn without regard to procedural rules to meet the requirements of basic fairness consistent with the limitation placed on the statutory provision of finality. If the government must point to secret

evidence to establish any basis in fact for a particular classification, to evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void. The point to be emphasized, however, is that in any event the government cannot use the F.B.I. file in a criminal trial. We do not read the Nugent case as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process. Applying these principles, we cannot hold that appellant was denied due process of law. As previously pointed out, the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary.

Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in Nugent to enable the Department "to discharge its duty to forward sound advice to the appeal board." Assuming *arguendo*, that sound advice is possible only if the hearing officer has heard both sides of the story, the test has still been met. Two types of adverse evidence contained in appellant's F.B.I. file, *i.e.*, evidence of drinking and carousing and evidence of brutality and abuse toward his wife, were referred to in the Department's report to the appeal board. By his own admission, appellant was informed of the first type and was questioned about this conduct. He testified that he informed the hearing officer that he had changed his ways. By his own admission, he and his wife were asked questions relating to his abuse of her. Appellant was present. His wife was present. He was afforded an opportunity to have other witnesses present. Thus, questions were addressed to appellant's witnesses in his presence which were sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency, the appeal board. This situation differs only in degree from that before the Supreme Court in *United States v. Packer*, 346 U.S. 1, where the court said at 7, n. 10: "Nor was respondent Packer denied his right to be [fol. 90] advised of the general nature of any evidence in the

FBI report which might defeat his claim. In response to his question, the hearing officer told him there was nothing unfavorable in it. The hearing officer's report, which was transmitted to the appeal board, corroborates this view. Nothing in the FBI report was transmitted to the appeal board, and thus it was given no indication that the FBI report was unfavorable." A complete summary may well be preferable procedure, but it is not the function of the court to require it as the only proper procedure.

In view of what has been said, the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the subpoena. *United States v. Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which, as we have previously pointed out, those decisions rest.

We do not preclude the possibility of a case of this nature arising in which examination by the court of the F.B.I. file might be necessary if the government is to meet the averment of a denial of due process of law. But this cause does not fall in that category. We should be reluctant to compel disclosure of investigative files in this type of case. As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards. A holding that these files must be disclosed in every case would effectively tie the hands of the draft officialdom, a result which we should be hesitant to promote.

We must consider briefly a final contention made by appellant. On January 20, 1953, several days after receipt of his notice to report, he submitted to the clerk of his local board a letter from one Charles K. Fetter, M.D., to the effect that his wife was seriously ill and that she was dependent on him for support and care. Appellant testified that he told the clerk he had learned of this condition only on January 16 and requested that his classification be reopened. No action was taken by the board. This refusal of the board to reopen was not, as appellant con-

[fol. 91] tends, an abuse of its sound discretion. A classification "may" be reopened after the registrant has been ordered to report for induction on a "written request" supported by "written evidence" of facts not previously considered by the board, only if the board "specifically finds there has been a change" in status "resulting from circumstances over which the registrant had no control." Selective Service Regulation 1622.2, 32 C.F.R. Sec. 1622.2 Appellant made no written request and submitted no written evidence of facts surrounding his wife's incapacitation on which he relied to support his dependency claim. We cannot say the board abused its discretion.

We conclude that appellant's classification is founded on an adequate basis in fact and that he was not denied due process. The judgment is affirmed.

[fol. 92] IN UNITED STATES COURT OF APPEALS, TUESDAY,
JUNE 15, 1954

Before:

Hon. J. Earl Major, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

No. 11011

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT SIMMONS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—Entered June 15, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

[fol. 93] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 94-96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed June 23, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 14th, 1954.

Sherman Minton, Associate Justice of the Supreme Court of the United States.

Dated this 28 day of June, 1954.

[fol. 97] [File endorsement omitted.]

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

JUL 30 1954

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

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Supreme Court of the United States

OCTOBER TERM, 1954

No.

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A to this petition. No opinion was written by the district court. The opinion by the Court of Appeals in the companion case of *United States v. Sicurella* referred to in the opinion in this case by the Court of Appeals is an appendix to the petition that accompanies this one.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing this petition for writ of certiorari has been extended to August 14, 1954. This petition for writ of certiorari is filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that those beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based solidly on the Word of God and the obligations that Simmons had to the Supreme Being.

The question here presented, therefore, is whether the denial of the claim for classification of petitioner by the appeal board as a conscientious objector was without basis

in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Section 6(j) of the act and Section 1626.25 of the Selective Service Regulations provide for the reference of the conscientious objector claim to the Department of Justice for appropriate inquiry and hearing. This is followed by a recommendation by the department to the appeal board on the conscientious objector claim. Petitioner had a hearing, after inquiry, that was followed by a report of the hearing officer to the Department of Justice and a recommendation by the Assistant Attorney General to the appeal board. The hearing officer of the department found petitioner to be a sincere and bona fide member of Jehovah's Witnesses, but recommended against the conscientious objector status. The draft board file of petitioner showed that while he was conscientiously opposed to direct participation in the armed forces he was a recent convert of Jehovah's Witnesses.

The Department of Justice placed weight on his being a recent convert and considered this as a basis for the denial of the conscientious objector status. The Court of Appeals also denied the classification for this reason stated by the Assistant Attorney General in his memorandum. The Court of Appeals held that because petitioner was a late-comer he was not a conscientious objector.

The question here presented, therefore, is whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny, and may the appeal board deny, the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is a recent convert to Jehovah's Witnesses.

III.

Following the preliminary denial of the conscientious objector status by the appeal board the case was referred

to the Department of Justice. The Federal Bureau of Investigation made a secret investigative report. The secret FBI report was turned over to the hearing officer. The hearing officer commanded Simmons to appear before him for a hearing. At the hearing the hearing officer had the FBI report before him. An adverse recommendation was made to the Department of Justice by the hearing officer. The Department of Justice in turn made an unfavorable recommendation to the appeal board. This was based upon the unfavorable evidence appearing in the FBI report.

At the hearing Simmons requested the hearing officer to give him the other unfavorable evidence that was in the report in addition to the statement that he had in the past hung around pool halls. At the hearing the hearing officer asked him if he was still carousing around and hanging out in pool halls. But he made no mention of the adverse evidence relied upon about the charges of beating his wife filed against petitioner in the state court. The hearing officer, therefore, failed and refused to give him vital information of an adverse nature requested by him. [19]¹

Petitioner contended that he had been denied his rights to procedural due process of law guaranteed by the act and the Constitution when the hearing officer failed to give him a fair and adequate summary of the adverse information appearing in the secret FBI report. [12-13] This point was raised in the motion for judgment of acquittal. [12-13] The motion for judgment of acquittal was denied. [3, 14-15]

The question presented here, therefore, is whether the petitioner was denied procedural due process of law upon the Department of Justice hearing when the hearing officer asked general questions, evaded the request of the petitioner for adverse information and failed to give petitioner a full and fair summary of the adverse information appearing in the secret investigative report relied upon by the

¹ Numbers appearing herein within brackets refer to pages of the printed record in this case.

Department of Justice in making its recommendation to the appeal board.

IV.

The subpoena duces tecum issued required the United States Attorney and the Federal Bureau of Investigation to produce at the trial the secret FBI investigative report used by the hearing officer. [5-6] The Government made a motion to quash the subpoena at the trial. [3] The petitioner filed his affidavit in opposition to the motion to quash. [6-9] The affidavit showed the materiality of the report and called the court's attention to the fact that it was necessary to have the secret investigative report at the trial in order to determine whether the hearing officer unlawfully failed to give Simmons a full and fair summary of the unfavorable evidence appearing in the report at the hearing conducted by West, the hearing officer. [7-9]

The court ordered the subpoena quashed. [9-10] Complaint was made of the quashing of this subpoena upon appeal. [75]

The question presented here, therefore, is whether the district court erred when it quashed the subpoena duces tecum commanding the production of the FBI report and denied the petitioner the right to use it at his trial to determine if the hearing officer had failed to give the petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report.

V.

Petitioner was ordered to report on January 6, 1953. [46-55-56, 72-73] This order commanded him to report for induction on January 19. [55-56] On January 16, it was developed at the hospital that petitioner's wife, because of an operation and physical condition, put a hardship and dependency case upon him. [21]

He obtained an affidavit from the attending physician that had supervision of his wife's case at the hospital. This

was filed with the local board on January 20, 1953. [20] The petitioner submitted this to the local board and requested it to reopen his case because of the hardship development, conditions beyond his control between the time of the issuance of the order to report for induction and the date that he was commanded to report for induction. [22] The local board (although it told Simmons that it would consider the affidavit), when he returned to find out what was done on February 2, 1953, informed him that the board was not going to consider the hardship and change of conditions shown in the affidavits. [22] The local board member told him: "That is your business. That is no concern of ours." [22]

The Director of Selective Service forwarded the letter showing a change of condition related to the board for consideration. [22-23, 59-60] Simmons showed that because of his wife's condition he was having to nurse her day and night. [24] The records show that the local board failed to reopen the case and recall the order to report for induction. In the motion for judgment of acquittal the petitioner contended that he had been denied his rights guaranteed by Section 1625.2 of the regulations and that the local board had acted illegally when it failed to reopen his case and recall the order to report for induction because of his changed circumstances over which he had no control and which justified a change in his classification to III-A. [13]

The motion for judgment of acquittal was overruled. [3, 14]

The question presented here, therefore, is whether the local board abused its discretion and refused to reopen the case of petitioner and reclassify him because of a change of circumstances over which he had no control and which required a new classification of dependency and hardship under the regulations because of the helpless condition of petitioner's wife, who was bedridden and suffering from galloping tuberculosis.

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86, particularly Section 6(j), 50 U. S. App., Supp. V, § 456(j), is involved. Also involved are the Selective Service Regulations. Specific consideration must be given to Sections 1622.14, 1625.2, 1626.25 and 1626.26 (32 C. F. R. §§ 1622.14, 1625.2, 1626.25 and 1626.26). The pertinent portions of the statute and the regulations are lengthy. They are printed as Appendix B to this brief at pages 41 to 46.

STATEMENT OF THE CASE

THE FACTS

Simmons was born on April 8, 1927. [39] He registered with his local board on September 10, 1948. [40] A classification questionnaire was mailed to him on December 6, 1948. [41] He filed out the questionnaire, giving his name and address. [42] At the time he filed his questionnaire he was not one of Jehovah's Witnesses. He did not answer that he was a minister of religion. [43]

He showed that he was a chauffeur for the Civil Service Commission. [43] He worked 40 hours per week at his job. [43] At the time he filed his questionnaire he was not a conscientious objector; therefore he failed to sign Series XIV. [44] He explained in his testimony why he did not sign the conscientious objector blank in the questionnaire. [25-26]

Not having any grounds for deferment he claimed in his classification questionnaire that he was entitled to classification I-A. [26, 44]

On December 23, 1948, the local board placed him in Class I-A. [45] He was not called for induction during this period because there was no induction. Simmons, on June 4, 1951, was placed in the deferred classification of a married man, Class III-A. [45] He remained in this classification

until October 22, 1951, when he was placed in Class I-A again and notified of it. [45]

Simmons requested that he be provided with a special form for conscientious objector. This was mailed to him on October 25, 1951. [46] On October 30 he was ordered to report for a preinduction physical examination on November 15, 1951. [70]

Simmons filed with his local board on October 30, 1951, his conscientious objector form. [46] He signed Series I(B) showing that he was opposed to both combatant and non-combatant military service. [46] He answered that he believed in the Supreme Being. [47] He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and also that he could not violate the commandments of God that prohibit killing. [47]

Simmons showed that he got his conscientious objections as the result of a Bible study with Jehovah's Witnesses that began in November, 1949. He showed that he progressed in this study under the direction of Clarence Houze, a minister of Jehovah's Witnesses. He answered that he had received his religious training from Houze under the direction of the Watchtower Bible and Tract Society, legal governing body of Jehovah's Witnesses. [47]

In the conscientious objector form Simmons also answered that he did not believe in the use of force at all unless it "be under the supervision of Jehovah God." [47] He certified that the thing that consistently demonstrated the depth of his conviction was his course of study and his activity as a minister. He emphasized that this should demonstrate the depth of his convictions. [47-48] He stated that he had given public expression to his belief. [48]

He then listed the schools that he had attended, his employers and his places of residence. [48-49]

Simmons showed that his father had no religion and that his mother was a Baptist. [49] He said that he had never been a member of any military organization. [49] He showed that he was a member of Jehovah's Witnesses, and that the legal governing body of that organization was the Watchtower Bible and Tract Society. He showed that he had become a member of Jehovah's Witnesses in the middle of November, 1949. He gave the addresss of the church that he attended and the name of the presiding minister. [49-50] He stated that Jehovah's Witnesses had a belief of being conscientiously opposed to combatant and noncombatant service. He answered that he was not a member of any other organization. [50]

Simmons testified that he was claiming to be both a minister and a conscientious objector at the time he filed the form. He said that he tried to use the form also in an effort to get a minister's classification. [28, 29] The local board, after the conscientious objector form was filed on November 26, 1951, classified Simmons in I-A. It denied the minister's claim as well as the conscientious objector status. [45]

The local board sent the file to the appeal board. [41] The appeal board made a predetermination that the registrant should be denied the conscientious objector status. It forwarded his file to the Department of Justice for appropriate inquiry and hearing. [45] Thereafter there was an extensive investigation by the Federal Bureau of Investigation. This was followed by a hearing before the Department of Justice hearing officer. [19, 53]

Upon the hearing there was no extensive inquiry or discussion as to the conscientious objections of Simmons. The hearing officer merely asked a few brief questions. He then told Simmons that he had the FBI secret investigative report. He informed Simmons that the report stated that he had been hanging around pool halls and that was about all

the report said. The hearing officer then asked Simmons if he still did that at the time of the hearing. Simmons replied that he did not. Simmons said that he then asked the hearing officer, "What else was in the report?" He said that West, the hearing officer, did not answer the question directly but began to talk about the time when he was associated with a large law firm in Chicago. He then told Simmons that he knew all the justices of the Supreme Court of the United States. [19]

West then asked the wife of Simmons, who was present at the hearing, how Simmons was treating her. Simmons testified that his wife said "fine." West, the hearing officer, then told Simmons that he was going to make a recommendation to Washington in favor of his ministerial claim. [19] West, the hearing officer, did not inform Simmons of the other adverse evidence against his conscientious objector status appearing in the file. [19, 52-55]

Following a consideration of the report of the hearing officer to the Department of Justice a recommendation was made by the Assistant Attorney General. This was sent to the appeal board. The recommendation was that Simmons be denied his conscientious objector claim. The recommendation finds that Simmons believes in the Supreme Being. [53] It found that according to the investigative report Simmons had been reading the Bible during lunch hour and discussing his belief with his fellow workers. One informant who knew about Simmon's former wife stated that he had changed and he believed "registrant is now sincere."

The recommendation of the Department of Justice relies upon unfavorable and adverse evidence that was not called to the attention of Simmons upon the occasion of his personal appearance. Emphasis is placed upon the police record of Simmons involving trouble with his wife and claims of his abusing her. [54] The recommendation of the Department of Justice is also grounded on the conclusion of the hearing officer in his report that Simmons' religious activities were simultaneous with his draft liability. The De-

partment of Justice concluded that he had less than two years' religious training with Jehovah's Witnesses. The Assistant Attorney General, T. Oscar Smith, said that because of this his sincerity was questionable. The Assistant Attorney General recommended against the claim of Simmons for classification as a conscientious objector. [52, 55]

The appeal board classified Simmons in Class I-A. [19, 41] He was notified of this. [41]

He was ordered to report for induction. The order issued on January 6, 1953. He was commanded to report on February 9, 1953. [46, 55-56, 72-73]

On January 16, 1953, after Simmons was ordered to report for induction he discovered that his wife, who had been in the hospital for some time, had become seriously ill and incapacitated to such an extent that he had a dependent and a hardship case that entitled him to deferment and reclassification in Class III-A. [34]

On January 20, 1953, he filed a doctor's affidavit as to the seriousness of his wife's condition, which made her dependency upon him a hardship case. [20, 63] Simmons then requested the local board to reopen his case and to reclassify him in III-A, temporarily pending the continued hardship and absolute dependency of his wife. [20] Simmons explained that his wife had an operation because of an infected gland and also that she had eight ribs removed making her a total dependent. The affidavit showed that she was confined to bed with tuberculosis. [20, 21]

The local board members stated that they would consider the affidavit of dependency and change of condition. [21] Simmons returned to the local board on February 2, 1953, several days before he was ordered to report for induction to find out about what the board had done concerning his request for a reopening of his classification. The board members said: "We are not going to consider that." Simmons asked what was going to happen to him because of his wife's serious condition. The board members said: "That is your business. This is no concern of ours." [22]

Simmons wrote a letter to the Director of Selective Service. This was forwarded to the local board for a consideration of the dependency status. [22-23, 59-60] The local board did not reconsider the change in status and the hardship dependency claim of Simmons although the evidence showed that the new and changed condition had come about due to circumstances that were entirely beyond his control.

Simmons reported to his local board for forwarding to the induction station on January 19. At the induction station his examination was not completed. He was examined several times during the next several days. Finally his examination was completed on February 9, 1953. He was ordered to submit to induction on that date. He refused to submit, for which he was prosecuted. [46, 55-56, 72-73]

FORM AND HISTORY OF ACTION SHOWING JURISDICTION IN COURTS BELOW

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470). Petitioner was charged with failing and refusing to submit to induction, contrary to the act. The indictment was filed on March 12, 1953. [1, 2, 4-5] The district court took jurisdiction under 18 U. S. C. § 3231. On May 19, 1953, the petitioner pleaded not guilty. [1, 2]

Petitioner caused to be issued and served upon the United States Attorney and the agent in charge of the Chicago Office of the Federal Bureau of Investigation a subpoena duces tecum. [2, 5-6] On the call of the case for trial September 18, 1953, the Government moved to quash the subpoena duces tecum. [3] The petitioner filed an affidavit in opposition to the motion to quash the subpoena duces tecum. In the affidavit petitioner stated that he needed the production of the FBI report so that it could be determined whether the hearing officer of the Department of Justice gave him the required full and fair summary of

the unfavorable evidence appearing in the FBI report as required by law. Petitioner said that if the production of the FBI report was not compelled he would be prejudiced. [6-9] The court ordered the subpoena duces tecum quashed. [3, 9-10]

The case proceeded to trial before the judge without a jury, which was waived. [1, 2, 15] At the close of all the evidence petitioner made his motion for judgment of acquittal. [3, 10-14] The motion for judgment of acquittal was denied. [3] On September 18, 1953, the trial court found the petitioner guilty and entered a judgment and commitment sentencing petitioner to the custody of the Attorney General for two years. [3, 14-15]

On September 28, 1953, a notice of appeal to the Court of Appeals was filed. [60, 74] The time for filing the record in the Court of Appeals was duly extended and the statement of points was duly filed as required by the rules of the court. [75]

REASONS FOR GRANTING THE WRIT

I.

The court below has decided that the rule of *Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953), does not apply in determining whether there is basis in fact for the denial of the conscientious objector status to petitioner. This is in direct conflict with decisions of other courts of appeals on the same question. The court below said:

"Defendant contends, on authority of *Dickinson v. United States*, 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in *Weaver v. United States*, 210 F. 2d 815, 822-823 (CA-8); *Schuman v. United States*, 208 F. 2d 801 (CA-9); and

Jewell v. United States, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition."

The decision below also conflicts with *Jessen v. United States*, 10th Cir., May 7, 1954, — F. 2d —, and *Pine v. United States*, 4th Cir., April 5, 1954, 212 F. 2d 93.

II.

The court below has decided that the recent conversion of petitioner as one of Jehovah's Witnesses is basis in fact for the denial of his conscientious objector status. This decision is in direct conflict with a decision of the United States Court of Appeals for the Ninth Circuit on the same matter.—*Schuman v. United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801.

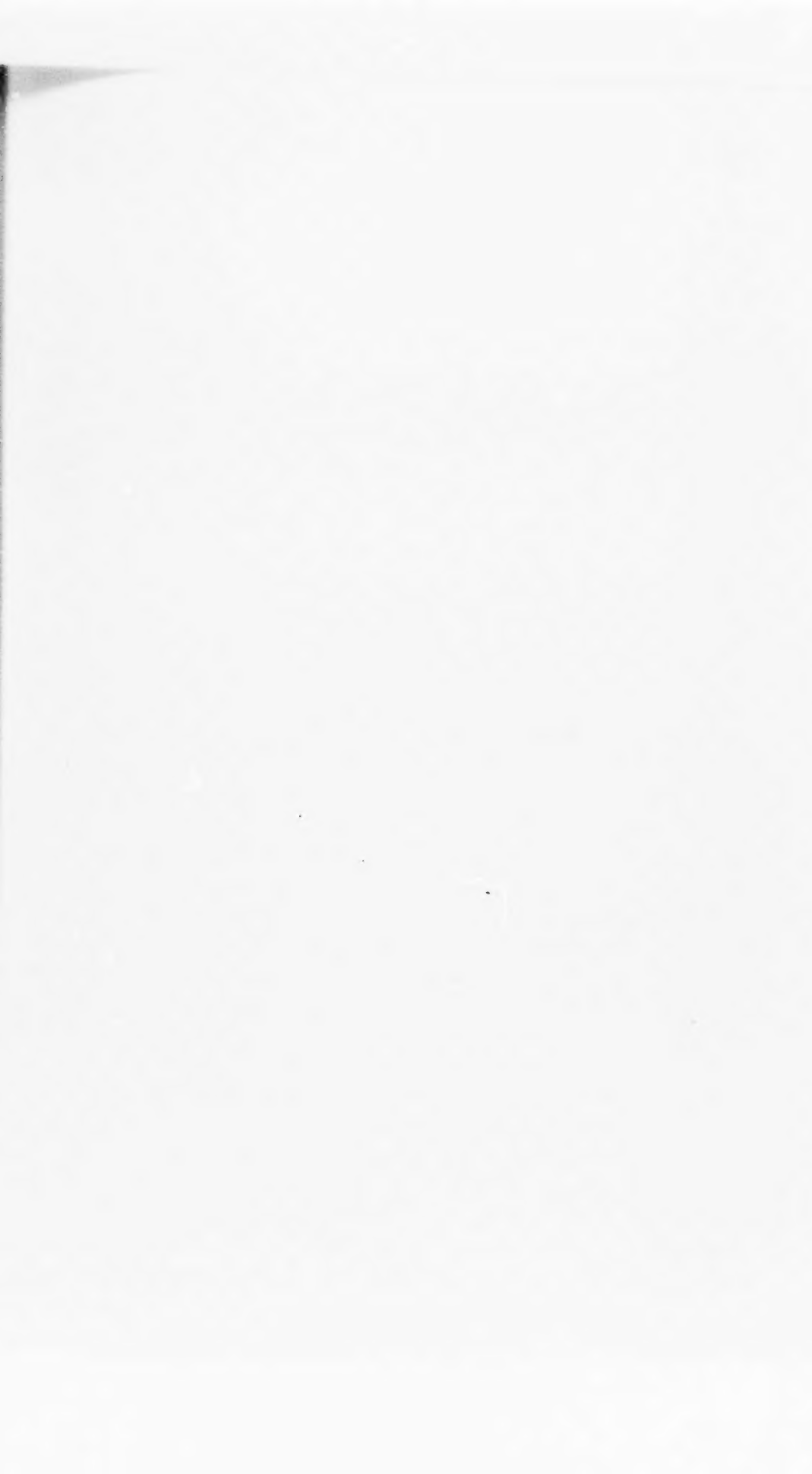
The court below said:

"Defendant contends that the denial of his claim was based solely on the fact that he is a latecomer to his religious beliefs and that he did not assert his claim until some three years after registration, at a time when his induction was imminent. We agree, as an abstract proposition, that the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status. However, we cannot subscribe to the view expressed in *Schuman v. United States*, 208 F. 2d 801, 805 (CA-9), that the board may never take this factor into account. . . .

We cannot close the door to the selective service boards' use of any valid inference in ruling on classification questions."

III.

The court below has rendered a decision on whether there is basis in fact for the denial of the conscientious ob-



jector status to petitioner. The record showed in his case the same facts that were disclosed in a number of other cases decided by other Courts of Appeals. In those cases it was held on the same showing, that there was no basis in fact for the denial of the conscientious objector classification.

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett v. United States*, 10th Cir., June 26, 1953, 205 F. 2d 680; *United States v. Pekarski*, 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs v. United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 320; *Jewell v. United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman v. United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States v. Hartman*, 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine v. United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen v. United States*, 10th Cir., May 7, 1954, — F. 2d —. See also *United States v. Close*, 7th Cir., June 10, 1954, — F. 2d — *United States v. Wilson*, 7th Cir., July 15, 1954, — F. 2d —. *United States v. Wilson*, 7th Cir., July 15, 1954, — F. 2d.

These cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection are concerned.

IV.

The court below has decided another question of federal law that is not only in conflict with the decisions of another circuit, but is also "in conflict with applicable decisions of

this court." (Rule 19(1)(b)) The court below held that the secret FBI investigative report was not material or relevant. The petitioner contended that he needed it to be produced to show that there was no proper summary of the report given to him as required by *United States v. Nugent*, 346 U. S. 1, and due process of law. The decision below conflicts with *United States v. Andolschek*, 2d Cir., 142 F. 2d 503, and *United States v. Krulewitch*, 2d Cir., 145 F. 2d 76, 79. The holding is also out of accord with and in conflict with the decision of this Court in *United States v. Reynolds*, 345 U. S. 1, at page 12.

V.

In the event this Court finds that there are no conflicts of decision between the holding of the Court below and those in *Weaver v. United States*, 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Schuman v. United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jewell v. United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Pine v. United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; and *Jessen v. United States*, 4th Cir., April 5, 1954, 212 F. 2d 93, then there is presented here "an important question of federal law which has not been, but should be settled by this court." It is whether the rule of *Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953), applies in conscientious objector cases.

There is no difference in the type of proof or the burden put on a conscientious objector and a registrant that claims classification as a governor, a congressman, a state legislator, a judge or a minister. The conscientious objector answers the same questionnaire given to all registrants by the Selective Service System. He goes further. He also fills out the special form for conscientious objector. The questions answered in this document are scrutinous.

The answers are evidence. The proof thus given is not mere allegations or claims. But it is proof. It establishes the facts. Evidence does not cease to be evidence because it is given by a conscientious objector. Solely because a man

partment of Justice report, we cannot say that it is arbitrary and capricious.

The only evidence in the file not previously referred to is the report of the Department of Justice. Summarizing the F.B.I. investigative file, this report stated that appellant had on three occasions exerted physical violence against, and had abused, his wife, and that, until some seven months immediately preceding the F.B.I. investigation, appellant was reputed to be a heavy drinker and gambler. The Justice Department report stated in part: "The Hearing Officer reports registrant impressed him as sincere but notes that his religious activities are coincident with pressing draft activities by officials and, therefore, recommends a I-A classification. * * * In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence toward his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952." The point is that these evidentiary factors have a bearing on the question of sincerity. It is immaterial whether we would have concluded that the circumstances mentioned are sufficient to disprove appellant's sincerity. Their presence of record precludes our saying that the challenged order is without basis in fact.

We thus reach the question of whether appellant was accorded due process of law. He contends that the standards of due process were violated in his hearing before the Department of Justice hearing officer and that this vitiates the induction order. No transcript of the proceedings before the hearing officer appears of record. At his trial, appellant testified that he asked that officer for information as to all unfavorable evidence contained in the F.B.I. investigative report; that he was informed that evidence in this report indicated that he had been hanging around pool halls and that he had been questioned about this facet

is a conscientious objector a question as to his credibility is not raised because of it.—*Smith v. United States*, 4th Cir., July 29, 1946, 157 F. 2d 176.

Everything required to be proved by a conscientious objector is subject to checking by the local board. (*Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953)) Any material answer given by him in his questionnaire or conscientious objector form may be contradicted. The answers are not such that they cannot be checked or the statements in them answered. The draft boards have as much authority to check answers in a conscientious objector case as they do in cases involving ministers of religion.—*Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953).

There is no greater chance of evasion of the draft as a conscientious objector (required to do civilian work contributing to national health and welfare) than there is in any other claim for classification. There is less, in fact. The reason is that there is the scrupulous secret FBI investigative report. Assume in the case of a conscientious objector the FBI investigative report does not turn up evidence that is contradictory to the answers given by the conscientious objector. Assume the FBI report is favorable in every respect. The appeal board then has before it a stronger case of uncontradicted evidence supporting a claim than in the case of a minister whose case is not checked so carefully.

All the statute requires a conscientious objector to show is (1) that he believes in the Supreme Being; (2) that his belief produces his opposition to combatant and noncombatant service; (3) that his belief comes from religious training and belief; (4) that his belief does not spring from political, sociological or philosophical study. The first two elements above stated depend only on the answers of the registrant and none other. Congress commits the answer to these to him and to him only. The last two are subject to investigation and contradiction. These two are subject to positive proof.

of his behavior; that the hearing officer evaded his request relative to the other adverse evidence contained in his file, and that this evidence was not made known to him.

Before the trial, at appellant's request, a subpoena *duces tecum* issued to compel the United States Attorney and the Federal Bureau of Investigation to produce this file at his trial. On leave of court, the government moved to quash. Appellant filed an affidavit in opposition to the motion. Therein the contention which forms the basis for our inquiry was advanced, viz., that due process of law requires that a registrant be given a full and fair summary of the unfavorable evidence contained in the F.B.I. report employed by the hearing officer in making his recommendation, and that the report must be produced at a subsequent trial of the registrant for refusing to submit to induction in order to enable the court to determine whether the officer has complied with the procedural requirements. The court granted the government's motion and quashed the subpoena.

Appellant contends that the Supreme Court in *United States v. Nugent*, 346 U. S. 1, established the rule that registrant must be accorded a full and fair résumé of all adverse evidence contained in the F.B.I. file. In *United States v. Nugent*, 200 F. 2d 46, and *United States v. Packer*, 200 F. 2d 540, the Court of Appeals for the Second Circuit reversed the conviction of the defendants, holding that refusal of the Justice Department hearing officer to disclose the F.B.I. reports to defendants was a denial of due process of law in the induction process which vitiated subsequent orders to submit to induction into the armed forces. On certiorari the Supreme Court reversed these decisions, saying, 346 U. S. at pages 5-6, "We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F.B.I. reports must be produced for their inspection."

A contention was made that the statute, so construed, was unconstitutional. Reviewing the statutory scheme for

There is open to inquiry in the case of a conscientious objector, however, the subject of his sincerity. Conscientious means sincere. Insincerity means hypocrisy. The draft boards and the Department of Justice are authorized by statute to make extensive inquiry to determine whether the registrant claiming to be a conscientious objector is a hypocrite. In other words they may determine whether the registrant is practicing what he preaches. Does he say one thing and do another when he says that he conscientiously objects to participation in the armed forces? Is it true that he got his objections from religious training and belief? Both these questions are subject to answer the same as any other question put to any other registrant.

The term "conscientiously opposed" used in the statute is not a vague and indefinite statement that is impossible of definition. It does not defy the ordinary means of proof. The term is not as vague or as elusive as the court below makes it for the purpose of evading the duty imposed upon it by *Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953); and *Estep v. United States*, 327 U. S. 114 (Feb. 4, 1946).

Is the court below correct in its decision that the *Dickinson* rule does not apply to conscientious objector cases? If it is, then it will be impossible for any federal court in any conscientious objector case, regardless of how strong the proof, to ever say that the draft board has denied the status without basis in fact! The court thus makes the rule in *Estep v. United States*, 327 U. S. 114 (Feb. 4, 1946), meaningless and wholly inapplicable in cases involving conscientious objectors. The court below has said so by its holding that the "no basis in fact" rule does not apply. It has thereby said that Congress intended to discriminate against the conscientious objector in favor of all other registrants when it came to a judicial review of the classification. The construction placed upon the act by the court below is contrary to the fair and just provisions of the act. (50 U. S. C. App. (Supp. V) § 451(c)) This is an important

selective service procedures, the court held that the "hearing" accorded to claimants of conscientious objector status, though it must be more than sham, does not require a formal judicial hearing comparable to a criminal trial. The court said: "Instead, the word [hearing] takes its meaning * * * from an analysis of the precise function which Congress has imposed upon the Department of Justice in [Section 456 (j)]. The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice. * * * The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. * * * [I]n this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's 'appropriate investigation' nor its 'hearing' is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant. Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. * * * It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national

question of federal law that has not been, but which ought to be, decided by the Court.

VI.

The court below has held that the late conversion of the petitioner to Jehovah's Witnesses is basis in fact for the denial of the conscientious objector claim. If this Court does not find a conflict with *Schuman v. United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801, then petitioner says there is presented here an important question of federal law which has not been, but which should be, settled by the Court. It is: whether the late conversion of a registrant to a religion that opposes participation in the armed forces of the United States is *per se* basis in fact for the denial of the conscientious objector status.

The statute does not freeze the exemption from military service to only those conscientious objectors that are such when they register. The regulations contemplate a change in status after registration. (32 C. F. R. § 1625.2) See also *Hull v. Stalter*, 7th Cir., 1945, 151 F. 2d 633; *United States v. Packer*, 2d Cir., 1952, 200 F. 2d 540, reversed on other grounds, 346 U. S. 1.—Compare *United States v. Clark*, W. D. Pa., June 26, 1952, 105 F. Supp. 613.

Congress had in mind the national policy of freedom of religion which permits the American people to have no religion if they choose none or change religions at their own free will. Surely Congress must have known that some of the 70 million that do not belong to any church would be seeing the light and embracing religion after war began or after the act went into effect. Certainly Congress must have had in mind the constant proselyting that is going on in this country by over 256 different religions.

There must be something expressed in the act that would compel an interpretation of it as claimed by the court below. The spirit of the act and the history of freedom of religion in this country compel a different construction, especially in the case of conscientious objectors. Proselyting

vigilance—when there is no time for ‘litigious interruption.’ *Falbo v. United States*, 320 U. S. 549, 554 (1944). Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the Constitution.” (Footnotes by the court omitted.) 346 U. S. at 7-10.

Quotation at length from the Nugent opinion is justified, we think, as demonstrative that the court did not presume to establish rules of procedure for the conduct of Department of Justice hearings. Appellant refers us to the language of the court appearing at page 6, “We think the Department of Justice satisfies its duties under Sec. 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator’s report.” He contends that by this language the Supreme Court announced the postulate that a fair résumé is a prerequisite to a fair hearing. The government insists, correctly we think, that the only issue before the court, which is pertinent to the question before us, was as to the right to inspect the F.B.I. file and that the least quoted language is *obiter* occurring in approving the procedure followed by the hearing officer in Nugent’s hearing.

The government’s contention is persuasive when the above quotations are considered together. Had the court intended to prescribe the minimum procedural rules for such hearings, it is not unreasonable to assume that it would have done so expressly in its discussion on the issue of constitutionality. There the court said that the hearing must be more than “sham” but need not be a “litigious controversy.” Thus we are told that somewhere between these two extremes lies the line between due process and arbitrary action. We are told further that the procedure employed by the hearing officer in Nugent’s case falls within the realm of due process. It does not follow from this that the Nugent procedure presents the minimum safeguards

is going on all the time. The *New York Times* (March 25, 1954) carried an account of a change in religions during the last ten years. It showed that 4,144,366 Roman Catholics have become Protestants and 1,071,897 Protestants have become Catholics during the last decade. This particular point is involved in the petition for writ of certiorari filed in *Gonzales v. United States*, No. 69, October Term, 1954.—See page 23 of the petition.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be, decided by this Court.

VII.

There is presented another question of federal law that ought to be decided by this Court. The point has never yet been determined. It is whether a hearing officer of the Department of Justice is required by due process of law and the "fair and just" provisions of the act to give a fair hearing. If so then does a fair hearing prohibit the hearing officer in this case from failing and refusing to make a full and fair résumé of the unfavorable evidence in the secret FBI investigative report? The adverse evidence in the secret report was relied upon by the hearing officer and the Department of Justice in making their report and recommendation to the appeal board. The hearing officer questioned the petitioner directly on one item of unfavorable evidence. It was about his former carousing around before becoming one of Jehovah's Witnesses. Indirectly he, by asking petitioner's wife who was present, touched upon other unfavorable evidence. But this was not done directly so as to give a résumé or summary of the unfavorable evidence as required by law. He asked petitioner's wife how he was treating her now. At this point the petitioner asked for more unfavorable evidence. The general question to his wife was not a summary. The hearing officer then evaded him and refused to supply it by passing on to irrelevancies. He broke in to tell that he was personally ac-

which will afford the registrant due process. Furthermore, the court indicated that Nugent and Packer had waived their right to object to any failure on the part of the hearing officer to give them a full summary of the evidence because they had failed to request such a summary. 346 U. S. at 6, n. 10. Thus the issue now facing us was not before the court in Nugent.

We are referred to numerous authorities to support appellant's contention. Brief reference to some of them will suffice to dispose of the point. In *United States v. Everngam*, 102 F. Supp. 128, the court held that proof on the face of the report of the hearing officer that his recommendation was based on his own belief, not on his appraisal of registrant's sincerity in his professed belief, to be a denial of due process which vitiated any order based thereon. *Eagles v. Samuels*, 329 U. S. 304, approved the use of theological panels to advise the local board with respect to ministerial claims, provided the information received from the panel be placed in the registrant's file and available to him. *United States v. Balogh*, 157 F. 2d 939 (CA-2), reversed a conviction of a registrant whose classification followed a referral of a claim to what the court found to be an illegally constituted theological panel. In *United States v. Cain*, 149 F. 2d 338 (CA-2), the court held that concealment of the identity of the members of a theological panel from a registrant and adventures of such panel into questions outside of the field of ecclesiastics vitiated an order based thereon. The court in *DeGraw v. Toon*, 151 F. 2d 778 (CA-2), ordered a serviceman released from military custody where his local board had concealed from him damaging evidence in his selective service file on which his classification and induction rested. These authorities are relevant only for the basic postulate on which each decision rests, namely, that a registrant is entitled "to know and confront the evidence" contained in his selective service file upon which his classification is based, *DeGraw v. Toon*, *supra* at 779, and to appear before a legally constituted advisory

quainted with all the members of the Supreme Court of the United States and that he was once a member of the largest law firm in Chicago.

The court below held that the unfair action of the hearing officer in not giving a full and fair summary of the adverse evidence did not constitute a violation of the rule laid down by this Court in *United States v. Nugent*, 346 U. S. 1, 6. The court below also held that *Nugent* did not require a full and fair résumé. Insofar as the court below made this holding it is submitted that the decision is in conflict with *United States v. Nugent*, 346 U. S. 1, 6. This Court has jurisdiction, therefore, to grant the writ on this question because the court below has "decided a federal question in a way in conflict with applicable decisions of this court." —Rule 19(1)(b).

The action of the hearing officer in refusing to give a full and fair summary denied petitioner due process of law. Read *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395. That case is directly in point.

The holding by the court below (that *United States v. Nugent*, 346 U. S. 1, 6, does not require a full and fair résumé) is in conflict with the interpretation placed upon that decision by the Department of Justice under Section 6(j) of the act. The Department of Justice, after the decision in the *Nugent* case, charged the procedure for hearing officers. Before that decision it was the practice of the Department of Justice to mail a notice such as that appearing in footnote 10 of the opinion in *United States v. Nugent*, 346 U. S. at page 6. The instructions then mailed out notified the registrant of his right to be provided the unfavorable evidence upon request. Paragraph 5 of the present instructions does not authorize the hearing officer merely to ask general questions and evade a registrant. What the hearing officer did is contrary to the present instructions saying what is a fair résumé. The instructions provide the registrant with a written and full résumé of all of the unfavorable information appearing in the report

agency which will frame its advice on the standards prescribed by the statute.

In *United States v. Bouziden*, 108 F. Supp. 395, the court held the failure of the hearing officer to inform a registrant of the adverse evidence on which his report and the Justice Department recommendation rested to be a denial of due process. And the Nugent case has been construed as requiring a full summary of adverse evidence contained in the registrant's F.B.I. file, *i.e.*, that failure of a hearing officer to give the registrant such a summary is a denial of due process which vitiates all subsequent proceedings in his case. *United States v. Evans*, 115 F. Supp. 340. This ruling has been followed in *United States v. Edmiston*, 118 F. Supp. 238; *United States v. Stull*, decided Nov. 6, 1953 (E. D. Va.); *United States v. Stasevic*, 117 F. Supp. 371; *United States v. Parker*, decided Dec. 2, 1953 (D. Mont.); and *United States v. Brussell*, Nov. 30, 1953 (D. Mont.). In each of these cases, however, the *Evans* decision has been adopted without analysis or evaluation. To the extent that these decisions hold that the registrant must be given an opportunity to know and rebut adverse evidence in his selective service file, which file must support a classification order of it is to survive judicial scrutiny, they merely restate accepted principles of due process in selective service cases. Since the F.B.I. file is no part of a registrant's selective service file, the holding in the *Evans* case that only a full summary by the hearing officer will satisfy due process requirements is, we believe, predicated on error in at least two respects. First, the decision is expressly premised on the postulate that, in a trial for the offense of refusing to submit to induction, the government has the burden of proving the validity of the classification on which the induction order is based. We consider this premise wholly inconsistent with the limited scope of judicial review permitted under the principle announced in *Estep v. United States*, 327 U. S. 114. Secondly, we cannot agree, as we have previously pointed out, with an interpretation of the Nugent

given by informers. This written summary accompanies the instructions without request. Read paragraph 5 of the notice and instructions, Appendix C, appearing at pages 47-49, below.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be decided by this Court.

VIII.

On the trial in the district court the question arose as to whether the hearing officer gave petitioner a full and fair summary. Before the trial started petitioner subpoenaed the FBI report for the use of the trial court in deciding the question. The trial court sustained the motion of the Government to quash the subpoena. The court below held that the ruling of the trial court was proper.

The position of petitioner can be simply stated by an analogy. Suppose petitioner wrote a review on a certain book. Assume that in a federal criminal trial it becomes necessary to determine whether the book review is fair and just. What is the only way that the district judge could decide such question?

It would be by reading the book and comparing the review with it. The district judge was required to do the same thing here. He should have compared the testimony of the petitioner with the FBI report. Then and then only could he decide whether a full and fair résumé required by *United States v. Nugent*, 346 U. S. 1, 6, was given to petitioner. He did not do it. This was error because the FBI report was not privileged against production. (*United States v. Andolschek*, 2d Cir., 142 F. 2d 503; *United States v. Krulewitch*, 2d Cir., 145 F. 2d 76, 79; *United States v. Reynolds*, 345 U. S. 1, 12) Several federal district courts have held that production of the secret FBI investigative reports may be compelled by subpoena duces tecum at the trial of cases such as this.—*United States v. Evans*, D. Conn., Aug. 20, 1953, 115 F. Supp. 340; *United States v.*

case as establishing a full summary as an absolute criterion for measuring the legality of the Justice Department hearing.

The line between "sham" and a "litigious proceeding" should, we believe, be drawn without regard to procedural rules to meet the requirements of basic fairness consistent with the limitation placed on the statutory provision of finality. If the government must point to secret evidence to establish any basis in fact for a particular classification, to evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void. The point to be emphasized, however, is that in any event the government cannot use the F.B.I. file in a criminal trial. We do not read the Nugent case as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process. Applying these principles, we cannot hold that appellant was denied due process of law. As previously pointed out, the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary.

Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in Nugent to enable the Department "to discharge its duty to forward sound advice to the appeal board." Assuming *arguendo*, that sound advice is possible only if the hearing officer has heard both sides of the story, the test has still been met. Two types of adverse evidence contained in appellant's F.B.I. file, *i.e.*, evidence of drinking and carousing and evidence of brutality and abuse toward his wife, were referred to in the Department's report to the appeal board. By his own admission, appellant was informed of the first type and was questioned about this conduct. He testified that he informed the hearing officer that he had changed

Edmiston, D. Nebr. Omaha Div., Jan 28, 1953, 118 F. Supp. 238; *United States v. Stasevic*, S. D. N. Y., Dec. 16, 1953, 117 F. Supp. 371; *United States v. Stull*, No. 5634, Eastern District of Virginia, Richmond Division, Nov. 6, 1953; *United States v. Parker*, No. 3651, District of Montana, Butte Division, Dec. 2, 1953; *United States v. Brussell*, No. 3650, District of Montana, Butte Division, Nov. 30, 1953. An envelope marked Appendix D containing printed copies of the unreported decisions accompanies this petition.

The holding of the court below that the FBI report was not material is out of order. The question involved was the error in quashing the subpoena. The materiality of the evidence could not be determined until after the evidence was considered on the trial. The motion to quash was determined long before all the evidence was in.

It is impossible, moreover, for the trial court to determine the materiality of the FBI report without seeing it. The procedure of the court below in ruling of the materiality upon a review of the order quashing the subpoena is putting the cart before the horse. Materiality is conclusively presumed, without considering the evidence, on deciding whether a motion to quash was properly or improperly sustained.—Compare *United States v. Schneiderman*, S. D. Cal., 104 F. Supp. 405.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be, decided by this Court.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner

August, 1954.

APPENDIX A
 IN THE
 UNITED STATES COURT OF APPEALS
 FOR THE SEVENTH CIRCUIT

No. 11011. OCTOBER TERM, 1953, APRIL SESSION, 1954.

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i> <i>vs.</i> ROBERT SIMMONS, <i>Defendant-Appellant.</i>	{ }	Appeal from the United States Dis- trict Court for the Northern District of Illinois, Eastern Division.
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June 15, 1954.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges*.

LINDLEY, *Circuit Judge*. Defendant was charged with willfully refusing to submit to induction into the armed forces of the United States in violation of the Universal Military Training and Service Act, 50 App. U. S. C. Sec. 462. He admitted that he had refused to submit, but averred that the induction order was void by reason of the invalidity of his selective service classification which denied his claim of exemption from service as a conscientious objector. This appeal followed a judgment of conviction entered by the court sitting without a jury.

We are faced with a situation where repetition of certain basic concepts may not be amiss. The issues before us, subject as they are to exaggerated emotionalism, are diffi-

cult for an impartial arbiter since they demand reconciliation of an apparent conflict between a paramount right of freedom of conscience and religion and an equally paramount duty of every individual to defend his sovereign nation. This conflict is ably discussed in *United States v. Izumihara*, 120 F. Supp. 36. Congress, as the legislative voice of the sovereign, might have demanded unequivocal support from every person within its jurisdiction when it framed the selective service laws. As an obvious expression of conviction that greater strength lay in the preservation thereby afforded to freedom of conscience than in universal participation in the armed forces, Congress provided an exemption from military service to those who, by reason of their religious training and belief, are conscientiously opposed to participation in war. 50 App. U. S. C. Sec. 456 (j). This exemption, however, is an exception to a general statute applicable to "every male person" within a defined age group, 50 App. U. S. C. Sec. 453, 454 (a), and is, therefore, a privilege extended by legislative grace. To avail one of this privilege, application must be made to the agency established by the statute, the local board, which is empowered to decide each such claim of privilege, subject to administrative appeal as provided by statute. 50 App. U. S. C. Sec. 456 (j).

The task of probing into and intelligently appraising the conscience of another is a difficult and unhappy one; but we should bear in mind that Congress has imposed this onus not upon the courts but upon the local board whose orders "within their respective jurisdictions" are expressly made final "subject to the right of appeal to the appeal boards herein authorized." 50 App. U. S. C. Sec. 460 (b) (3). See *United States v. Adamowicz*, decided March 19, 1954 (N. D. Ill.). Judicial review of such orders is severely restricted. *Estep v. United States*, 327 U. S. 114. Our duty is done if we be solicitous that our decision on the issues before us accords to the individual defendant due process of law without

losing sight of the full purpose of the Act which Congress has determined to be in the best national interest.

The teachings applicable to the general field of administrative law are of little aid in judicial review of orders issued by the selective service agencies. The phrase "within their respective jurisdictions" employed in 50 App. U. S. C. Sec. 460 (b) (3) has been interpreted to limit finality of such orders to those which the administrative agency has jurisdiction to make. In the language of the Supreme Court, this jurisdictional question is reached by the courts in any case "only if there is *no basis in fact* for the classification which [an administrative board] gave the registrant." (Emphasis supplied.) *Estep v. United States*, 327 U. S. 114, 122.

Though the scope of judicial review within the "basis of fact" concept lacks exact definition, certain definite conclusions follow from pronouncements by the court in *Estep* and subsequent cases. Obviously the burden is on the claimant to prove himself to be within the group entitled to claim the privilege. The court reviewing an order denying such a claim of privilege may not weigh the evidence. The selective service file may be scrutinized only for the narrow purpose of determining whether any factual basis supports the classification, and in its scrutiny the reviewing court may not require adherence by the administrative body to the niceties of judicial rules of evidence. When and if the court determines that the contested order rests on a basis in fact, its jurisdiction ends, even though the court be convinced that the order is erroneous. See generally *Estep v. United States*, *supra*; *Dickinson v. United States*, 346 U. S. 389; *Cox v. United States*, 332 U. S. 442; *Eagles v. Samuels*, 329 U. S. 304; *Eagles v. Horowitz*, 329 U. S. 317; *Gibson v. United States*, 329 U. S. 338.

Defendant contends, on authority of *Dickinson v. United States*, 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for

exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in *Weaver v. United States*, 210 F. 2d 815, 822-823 (CA-8); *Schuman v. United States*, 208 F. 2d 801 (CA-9); and *Jewell v. United States*, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition.

Dickinson was convicted of refusing to submit to induction into the armed forces in violation of an order based on a selective service determination that he was not entitled to a claimed minister of religion classification. After reaffirming the "basis in fact" test of *Estep*, the court found no factual basis in the record to support the denial of the claimed exemption. The court said, 346 U. S. at 396-397: "The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. * * * However, Dickinson's claims were not disputed by any evidence presented to the selective service authorities nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here. (The court then states that local boards are not bound by traditional rules of evidence and that courts may not apply a test of substantial evidence.) However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. * * * When the uncontradicted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concept of justice." Thus the court says that once a registrant has made out a *prima facie* case, which is not contradicted, a denial of the exemption claimed is without factual basis. We cannot apply this

principle generally to every case without regard to the quality of the proof made by the registrant.

Furthermore, this language must be interpreted in the light of the claim and proofs made by Dickinson. Thus, a distinction must be drawn, we believe, between a claim of ministerial status and a claim of conscientious objection status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as his principal vocation the leadership of and ministering to the followers of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based oftentimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may

not inquire further as to the correctness of the board's order.

Conscientious objector cases cannot be rationalized as defendant's argument would have us do and some courts seemingly have tried to do. Affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith. Each case must stand or fall on its own facts. Were this not true, the mass conversion of males, eligible for the draft, to particular faiths might be justified merely because of the "hot breath of the draft board" on their necks. *United States v. Izumihara*, 120 F. Supp. 36, 41. Although this does not make every member of any sect suspect, the temptation present for those who would evade the draft is a factor which we should not foreclose the boards from considering on a claim of exemption. We could justify doing so under the Dickinson decision only on proof of a *prima facie* case for exemption, when the only conclusion possible on the record is that the denial of a claim of exemption is arbitrary and capricious. We could, under such circumstances, impose on the board the burden of making a record to support its order.

The uncontroverted evidence in the Dickinson case was that the draftee had been designated by the governing body of his sect, as a fulltime pioneer minister; that he was the presiding minister over a "Company" encompassing members residing in an area of some 5,000 square miles; that, as presiding minister, he devoted some 150 hours per month to missionary work; that he arranged and presided over some three or four meetings of his "Company" each week; that he instructed prospective ministers, and that his subsistence was derived from the benevolence of his followers and some five hours per week devoted to secular employment. The court found no evidence in the record to contradict this "*prima facie*" proof of a minister of religion

status, and held that this factual proof could not be ignored by the board, in the absence of affirmative evidence to rebut it. The decision does not impose on the boards the burden of rebutting every claim made irrespective of the proof offered by the applicant. So to construe it would be to convert a privilege granted by legislative grace into an absolute right.

Applying these standards, is the order before us arbitrary and capricious, rendering appellant's classification void? We think not. In executing his classification questionnaire (SSS Form 100), appellant did not claim conscientious objector status. He stated that on the basis of "facts set forth in this questionnaire * * * my classification should be I-A." He was given a preliminary classification of I-A, in which he remained for some two and one-half years until June 4, 1951, when he was reclassified III-A (dependency).

On October 22, 1951, appellant was again classified I-A. On October 25, 1951, he requested SSS Form 150 to claim exemption from military service as a conscientious objector (I-O). On October 30, 1951, he was ordered to report for his preinduction physical examination. On the same day he filed Form 150, in which he stated that he was conscientiously opposed to either combatant or noncombatant military service; that his conscientious objection to such service grew out of beliefs acquired through a course of Bible study begun in 1949, under the direction of his sect; that he became a member in November 1949, and that he did not believe in the use of force except under the direction "of Jehovah God." Thereafter, he was given a hearing before his local board, which found the evidence insufficient to require reopening his classification. The appeal board, after submitting appellant's claim to the Department of Justice for investigation and hearing, by unanimous vote, rejected his claim and sustained his classification as I-A.

Defendant contends that the denial of his claim was based solely on the fact that he is a latecomer to his religious

beliefs and that he did not assert his claim until some three years after registration, at a time when his induction was imminent. We agree, as an abstract proposition, that the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status. However, we cannot subscribe to the view expressed in *Schuman v. United States*, 208 F. 2d 801, 805 (CA-9), that the board may never take this factor into account. See *Corrigan v. Secretary of the Army*, 211 F. 2d 293 (CA-9), in which defendant claimed he was converted to conscientious objection to war while listening to orientation instruction given immediately before induction. Espousal of certain beliefs coincident with pressing induction demands, when coupled with other evidence which casts doubt on the sincerity of an individual claimant, may well support an inference that the espousal of the religious belief was motivated not by conscience but by a desire to remain a civilian. We cannot close the door to the selective service boards' use of any valid inference in ruling on classification questions. To do so would disembowel the statute and refute the express congressional purpose in its enactment.

The government cites certain negative circumstances which it contends support the classification. Appellant did not assert his claim until some two years after he became a member of Jehovah's Witnesses and more than two and one-half years after he had been classified I-A, on his own statement that such classification was proper. His claim was supported only by his own statement. No other members of the sect appeared in his behalf. Affidavits of no other members were filed in his behalf. Considering his claim in the light of those of other members of the sect, as the board was entitled to do, on the evidence of record, we cannot say that its denial of his claim is without basis in fact. *United States v. Dal Santo*, 205 F. 2d 429, cert. denied 346 U. S. 858 (CA-7). The order may well have been erroneous, but on the record before us, excluding reference to the De-

his ways. By his own admission, he and his wife were asked questions relating to his abuse of her. Appellant was present. His wife was present. He was afforded an opportunity to have other witnesses present. Thus, questions were addressed to appellant's witnesses in his presence which were sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency, the appeal board. This situation differs only in degree from that before the Supreme Court in *United States v. Packer*, 346 U. S. 1, where the court said at 7, n. 10: "Nor was respondent Packer denied his right to be advised of the general nature of any evidence in the FBI report which might defeat his claim. In response to his question, the hearing officer told him there was nothing unfavorable in it. The hearing officer's report, which was transmitted to the appeal board, corroborates this view. Nothing in the FBI report was transmitted to the appeal board, and thus it was given no indication that the FBI report was unfavorable." A complete summary may well be preferable procedure, but it is not the function of the court to require it as the only proper procedure.

In view of what has been said, the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the subpoena. *United States v. Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which, as we have previously pointed out, those decisions rest.

We do not preclude the possibility of a case of this nature arising in which examination by the court of the FBI file might be necessary if the government is to meet the averment of a denial of due process of law. But this cause does not fall in that category. We should be reluctant to compel disclosure of investigative files in this type of case. As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a

virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards. A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote.

We must consider briefly a final contention made by appellant. On January 20, 1953, several days after receipt of his notice to report, he submitted to the clerk of his local board a letter from one Charles K. Fetter, M.D., to the effect that his wife was seriously ill and that she was dependent on him for support and care. Appellant testified that he told the clerk he had learned of this condition only on January 16 and requested that his classification be reopened. No action was taken by the board. This refusal of the board to reopen was not, as appellant contends, an abuse of its sound discretion. A classification "may" be reopened after the registrant has been ordered to report for induction on a "written request" supported by "written evidence" of facts not previously considered by the board, only if the board "specifically finds there has been a change" in status "resulting from circumstances over which the registrant had no control." Selective Service Regulation 1622.2, 32 C. F. R. Sec. 1622.2. Appellant made no written request and submitted no written evidence of facts surrounding his wife's incapacitation on which he relied to support his dependency claim. We cannot say the board abused its discretion.

We conclude that appellant's classification is founded on an adequate basis in fact and that he was not denied due process. The judgment is affirmed.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing

to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recom-

mentation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

*"When Registrant's Classification May Be Reopened and Considered Anew.—*The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

"Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O.

If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recom-

mend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"Decision of Appeal Board.—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

APPENDIX C

(COPY OF NOTICE OF HEARING OFFICER
AND INSTRUCTIONS TO REGISTRANT USED
AFTER JULY, 1953)

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

NOTICE OF HEARING

.....
(CITY) (STATE) (DATE)

To:

NAME OF REGISTRANT

.....
(STREET ADDRESS) (CITY) (STATE)

You are hereby notified that before the undersigned
Hearing Officer at Room,
(BUILDING) (STREET ADDRESS)

..... at o'clock on
(CITY) (STATE) (HOUR)

....., 195.., a hearing at
(MONTH) (DAY)

which you are requested to be present, will be held by the
Department of Justice to consider your claim to exemption
from training and service under the Universal Military
Training and Service Act by reason of your alleged con-
scientious objection to participation in war in any form.

....., Hearing Officer
Special Assistant to the Attorney General

(NEW INSTRUCTIONS SINCE JULY 1953)

ADDENDUM NO. 1 TO INSTRUCTIONS TO
HEARING OFFICERS APPOINTED PURSUANT TO
THE UNIVERSAL MILITARY TRAINING AND
SERVICE ACT

Notice of Hearing and Instructions to Registrants Whose
Claims for Exemption as Conscientious Objectors Have
Been Appealed

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (P. L. 51, 82nd Cong., 1st Session; 50 USC App. 466(j), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious objector claim. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his claim. Written statements shall be sworn to

or affirmed before a notary public or other persons authorized to administer oaths.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Legal rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any argument concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

....., Hearing Officer

Office - Supreme Court, U. S.
FILED

OCT 2 1954

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

**REPLY TO BRIEF
FOR THE UNITED STATES IN OPPOSITION**

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

MAY IT PLEASE THE COURT:

Since I informed the Clerk of this Court that no reply in opposition would be filed in this case two decisions have been handed down by the United States Court of Appeals for the Ninth Circuit, making necessary this brief memorandum designated "Reply to Brief for the United States in Opposition."

I.

The Court of Appeals for the Ninth Circuit in *White v. United States*, No. 13893, decided September 14, 1954, and in *Tomlinson v. United States*, No. 13892, decided September 15, 1954, followed the decision of the Court of Appeals for the Seventh Circuit in this case and in *Sicurella v. United States*, No. 250, October Term, 1954.

Petitions for writs of certiorari will be filed within the thirty-day time limit in the *White* and *Tomlinson* cases.

II.

Petitioner Simmons objects to the suggestion of the Government in its brief in opposition that the petition for writ of certiorari should be limited in this case. All five of the questions presented to this Court in the petition for writ of certiorari at pages 2 to 6 will be presented to this Court in the *White* and *Tomlinson* cases.

The first question presented in this case is a very important one and should not be removed from the case. This question, as the same question involved in *Sicurella v. United States*, No. 250, October Term, 1954, involves the point of whether *Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953), applies in cases involving conscientious objectors. The court below and the Court of Appeals for the Ninth Circuit in the *White* and *Tomlinson* cases held that the rule of the *Dickinson* case did not apply. The holding of the court below and that of the Ninth Circuit in the *White* and *Tomlinson* cases are in direct conflict with *Weaver v. United States*, 8th Cir., 1954, 210 F. 2d 815; *Jessen v. United States*, 10th Cir., 1954, 212 F. 2d 897; *Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93; *United States v. Wilson*, 7th Cir., July 15, 1954, — F. 2d —. See also *Schuman v. United States*, 9th Cir., 1953, 208 F. 2d 801, 804; but compare footnote 4, page 7 of slip copy of opinion in *White v. United States*, No. 13893, decided September 14, 1954, by the Ninth Circuit.

In these holdings it was expressly declared to the direct

opposite of the court below that the rule of *Dickinson v. United States*, 346 U. S. 389 (Nov. 30, 1953), did apply to conscientious objector cases. There is a direct conflict, therefore, between the holding by the court below and those of other courts of appeals on the point of whether the *Dickinson* rule applies in cases of this sort. The question is, moreover, of great public importance to the Government and the people of the United States in the administration of the draft law.

III.

The holding of the court below that it was unnecessary to provide Simmons with a summary of the unfavorable evidence appearing in the FBI report is in direct conflict with *United States v. Gray*, 9th Cir., Sept. 22, 1953, 207 F. 2d 237, 241-242. This conflict is another reason why the writ of certiorari should not be limited. It should be granted to determine whether the hearing officer gave Simmons a full and fair summary of the unfavorable evidence appearing in the FBI report.

CONCLUSION

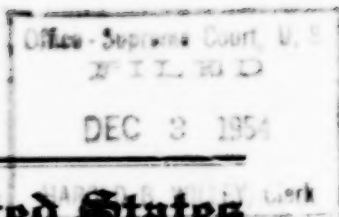
WHEREFORE the writ of certiorari should be granted as prayed for in the petition.

HAYDEN C. COVINGTON

Counsel for Petitioner

September, 1954.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

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O N E

The denial of the conscientious objector status and the final classification of I-A by the appeal board were without basis in fact, arbitrary and capricious. 26-40

T W O

Petitioner was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report used by the hearing officer and the Assistant Attorney General in the making of their recommendation under the act. 40-53

T H R E E

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report and prevented the use of the report at the trial for the purpose of determining whether the hearing officer had given a full and fair summary of the adverse evidence appearing in the secret FBI investigative report. 53-72

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FOUR

<p>In the event this Court concludes that the order sustaining the motion to quash in this case is proper and no error was committed, then petitioner requests this Court to reconsider and reverse its ruling in <i>United States v. Nugent</i>, 346 U. S. 1 (1953).</p> <p>Conclusion</p> <p>Appendix A—Memorandum for Hearing Officers by Assistant Attorney General, dated September 3, 1953, concerning résumés</p> <p>Appendix B—Notice of Hearing and Instructions to Registrants (since July, 1953)</p> <p>Appendix C—Petition for Rehearing in Nos. 540 and 573, October Term, 1953 . . <i>accompanying this brief</i></p>	<p>72</p> <p>73</p> <p>74</p> <p>75</p>
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Supreme Court of the United States

OCTOBER TERM, 1954

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported. (213 F. 2d 901) It also appears in the record. [R. 77-92] No opinion was written by the district court. The opinion by the Court of Appeals in the companion case of *United States v. Sicurella*, referred to in the opinion in this case by the Court of Appeals, appears in the record in that case at page 110. It is an appendix to the petition in that case also.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing this petition for writ of certiorari was extended to August 14, 1954. The petition for writ of certiorari was filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the

armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or

neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952)) provides:

Class I-O: Co. scientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1625.2 of the Selective Service Regulations (32 C. F. R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"When registrant's classification may be reopened and considered anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the

current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (E. O. 10363, 17 F. R. 5456, June 18, 1952)) provides:

"Special provisions when appeal involves claim that registrant is a conscientious objector.—(1) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of

securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"Decision of appeal board.—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *provided*, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial by the appeal board of the claim for classification of petitioner as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny and whether the appeal board may deny the con-

scientious objector status because the petitioner, an objector to direct participation in the armed forces, is a recent convert to Jehovah's Witnesses.

III.

Whether the petitioner was denied procedural due process of law upon the Department of Justice hearing when the hearing officer asked general questions, evaded the request of the petitioner for adverse information and failed to give petitioner a full and fair summary of the adverse information appearing in the secret investigative report relied upon by the Department of Justice in making its recommendation to the appeal board.

IV.

Whether the district court erred when it quashed the subpoena *duces tecum* commanding the production of the FBI report and denied the petitioner the right to use it at his trial to determine if the hearing officer had failed to give the petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report.

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470). Petitioner was charged with failing and refusing to submit to induction, contrary to the act. The indictment was filed on March 12, 1953. [R.1, 2, 4-5] The district court took jurisdiction under 18 U. S. C. § 3231. On May 19, 1953, the petitioner pleaded not guilty. [R. 1, 2]

Petitioner caused to be issued and served upon the United States Attorney and the agent in charge of the Chicago Office of the Federal Bureau of Investigation a subpoena *duces tecum*. [R. 2, 5-6] On the call of the case for trial September 18, 1953, the Government moved to quash

the subpoena *duces tecum*. [R. 3] The petitioner filed an affidavit in opposition to the motion to quash the subpoena *duces tecum*. In the affidavit petitioner stated that he needed the FBI report produced so that it could be determined whether the hearing officer of the Department of Justice gave him the required full and fair summary of the unfavorable evidence appearing in the FBI report as required by law. Petitioner said that if the production of the FBI report was not compelled he would be prejudiced. [R. 6-9] The court ordered the subpoena *duces tecum* quashed. [R. 3, 9-10]

The case proceeded to trial before the judge without a jury, which was waived. [R. 1, 2, 15] At the close of all the evidence petitioner made his motion for judgment of acquittal. [R. 3, 10-14] The motion for judgment of acquittal was denied. [R. 3] On September 18, 1953, the trial court found the petitioner guilty and entered a judgment and commitment sentencing petitioner to the custody of the Attorney General for two years. [R. 3, 14-15]

On September 28, 1953, a notice of appeal to the Court of Appeals was filed. [R. 60, 74] The time for filing the record in the Court of Appeals was duly extended and the statement of points was duly filed as required by the rules of the court. [R. 75] The court below affirmed. [R. 115]

Simmons was born on April 8, 1927. [R. 39] He registered with his local board on September 10, 1948. [R. 40] A classification questionnaire was mailed to him on December 6, 1948. [R. 41] He filled out the questionnaire, giving his name and address. [R. 42] At the time he filed his questionnaire he was not one of Jehovah's Witnesses. He did not answer that he was a minister of religion. [R. 43]

He showed that he was a chauffeur for the Civil Service Commission. [R. 43] He worked 40 hours per week at his job. [R. 43] At the time he filed his questionnaire he was

not a conscientious objector; therefore he failed to sign Series XIV. [R. 44] He explained in his testimony why he did not sign the conscientious objector blank in the questionnaire. [R. 25-26]

Not having any grounds for deferment he claimed in his classification questionnaire that he was entitled to classification I-A. [R. 26, 44]

On December 23, 1948, the local board placed him in Class I-A. [R. 45] He was not called for induction during this period, because there was no induction. On June 4, 1951, Simmons was placed in the deferred classification of a married man, Class III-A. [R. 45] He remained in this classification until October 22, 1951, when he was placed in Class I-A again and notified of it. [R. 45]

Simmons requested that he be provided with a special form for conscientious objector. This was mailed to him on October 25, 1951. [R. 46] On October 30 he was ordered to report for a preinduction physical examination on November 15, 1951. [R. 70]

On October 30, 1951, Simmons filed with his local board his conscientious objector form. [R. 46] He signed Series I(B), showing that he was opposed to both combatant and noncombatant military service. [R. 46] He answered that he believed in the Supreme Being. [R. 47] He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and, also, that he could not violate the commandments of God that prohibit killing. [R. 47]

Simmons showed that he got his conscientious objections as the result of a Bible study with Jehovah's Witnesses that began in November, 1949. He showed that he progressed in this study under the direction of Clarence

Houze, a minister of Jehovah's Witnesses. He answered that he had received his religious training from Houze under the direction of the Watchtower Bible and Tract Society, legal governing body of Jehovah's Witnesses. [R. 47]

In the conscientious objector form Simmons also answered that he did not believe in the use of force at all unless it "be under the supervision of Jehovah God." [R. 47] He certified that the thing that consistently demonstrated the depth of his conviction was his course of study and his activity as a minister. He emphasized that this should demonstrate the depth of his convictions. [R. 47-48] He stated that he had given public expression to his belief. [R. 48]

He then listed the schools that he had attended, his employers and his places of residence. [R. 48-49]

Simmons showed that his father had no religion and that his mother was a Baptist. [R. 49] He said that he had never been a member of any military organization. [R. 49] He showed that he was a member of Jehovah's Witnesses, and that the legal governing body of that organization was the Watchtower Bible and Tract Society. He showed that he had become a member of Jehovah's Witnesses in the middle of November, 1949. He gave the address of the church that he attended and the name of the presiding minister. [R. 49-50] He stated that Jehovah's Witnesses had a belief of being conscientiously opposed to combatant and noncombatant service. He answered that he was not a member of any other organization. [R. 50]

Simmons testified that he was claiming to be both a minister and a conscientious objector at the time he filed the form. He said that he tried to use the form also in an effort to get a minister's classification. [R. 28, 29] The local board, after the conscientious objector form was filed on November 26, 1951, classified Simmons in I-A. It denied the minister's claim as well as the conscientious objector status. [R. 45]

The local board sent the file to the appeal board. [R. 41] The appeal board made a predetermination that the registrant should be denied the conscientious objector status. It forwarded his file to the Department of Justice for appropriate inquiry and hearing. [R. 45] Thereafter there was an extensive investigation by the Federal Bureau of Investigation. This was followed by a hearing before the Department of Justice hearing officer. [R 19, 53]

Upon the hearing there was no extensive inquiry or discussion as to the conscientious objections of Simmons. The hearing officer merely asked a few brief questions. He then told Simmons that he had the FBI secret investigative report. He informed Simmons that the report stated that he had been hanging around pool halls and that was about all the report said. The hearing officer then asked Simmons if he still did that at the time of the hearing. Simmons replied that he did not. Simmons said that he then asked the hearing officer, "What else was in the report?" He said that West, the hearing officer, did not answer the question directly but began to talk about the time when he was associated with a large law firm in Chicago. He then told Simmons that he knew all the justices of the Supreme Court of the United States. [R. 19]

West then asked the wife of Simmons, who was present at the hearing, how Simmons was treating her. Simmons testified that his wife said "fine." West, the hearing officer, then told Simmons that he was going to make a recommendation to Washington in favor of his ministerial claim. [R. 19] West, the hearing officer, did not inform Simmons of the other adverse evidence against his conscientious objector status appearing in the file. [R. 19, 52-55]

Following a consideration of the report of the hearing officer to the Department of Justice a recommendation was made by the Assistant Attorney General. This was sent to the appeal board. The recommendation was that Simmons be denied his conscientious objector claim. The recommen-

dation found that Simmons believes in the Supreme Being. [R. 53] It found that according to the investigative report Simmons had been reading the Bible during lunch hour and discussing his belief with his fellow workers. One informant who knew about Simmons' former life stated that he had changed and he believed "registrant is now sincere." [R. 53-54]

The recommendation of the Department of Justice relies upon unfavorable and adverse evidence that was not called to the attention of Simmons upon the occasion of his personal appearance. Emphasis is placed upon the police record of Simmons, involving trouble with his wife and claims of his abusing her. [R. 54] The recommendation of the Department of Justice is also grounded on the conclusion of the hearing officer in his report that Simmons' religious activities were simultaneous with his draft liability. The Department of Justice concluded that he had less than two years' religious training with Jehovah's Witnesses. The Assistant Attorney General, T. Oscar Smith, said that because of this his sincerity was questionable. The Assistant Attorney General recommended against the claim of Simmons for classification as a conscientious objector. [R. 52, 55]

The appeal board classified Simmons in Class I-A. [R. 19, 41] He was notified of this. [R. 41]

He was ordered to report for induction. The order issued on January 6, 1953. He was commanded to report on February 9, 1953. [R. 46, 55-56, 72-73]

On January 16, 1953, after Simmons was ordered to report for induction he discovered that his wife, who had been in the hospital for some time, had become seriously ill and incapacitated to such an extent that he had a dependent and a hardship case that entitled him to deferment and reclassification in Class III-A. [R. 34]

On January 20, 1953, he filed a doctor's affidavit as to the seriousness of his wife's condition, which made her de-

pendency upon him a hardship case. [R. 20, 63] Simmons then requested the local board to reopen his case and to reclassify him in III-A, temporarily pending the continued hardship and absolute dependency of his wife. [R. 20] Simmons explained that his wife had an operation because of an infected gland and also that she had eight ribs removed, making her a total dependent. The affidavit showed that she was confined to bed with tuberculosis. [R. 20, 21]

The local board members stated that they would consider the affidavit of dependency and change of condition. [R. 21] Simmons returned to the local board on February 2, 1953, several days before he was ordered to report for induction, to find out about what the board had done concerning his request for a reopening of his classification. The board members said: "We are not going to consider that." Simmons asked what was going to happen to him because of his wife's serious condition. The board members said: "That is your business. This is no concern of ours." [R. 22]

Simmons wrote a letter to the Director of Selective Service. This was forwarded to the local board for a consideration of the dependency status. [R. 22-23, 59-60] The local board did not reconsider the change in status and the hardship dependency claim of Simmons although the evidence showed that the new and changed condition had come about due to circumstances that were entirely beyond his control.

Simmons reported to his local board for forwarding to the induction station on January 19. At the induction station his examination was not completed. He was examined several times during the next several days. Finally his examination was completed on February 9, 1953. He was ordered to submit to induction on that date. He refused to submit, for which he was prosecuted. [R. 46, 55-56, 72-73]

The papers filed showed that Simmons was a bona fide conscientious objector to both combatant and noncombatant military service. [R. 25-26, 46-50, 52-55] The appeal board classified Simmons I-A. In the motion for judgment of acquittal he contended that the denial of the conscientious objector status was without basis in fact. [R. 11] The motion was denied. [R. 3, 14-15] The court below held that there was basis in fact for the denial of the conscientious objector status. [R. 83-85, 92]

There was a hearing in the Department of Justice. This was followed by a report and recommendation to the appeal board. [R. 52-55] The Department of Justice recommended that the conscientious objector status be denied. The basis of the recommendation was that the petitioner became a conscientious objector too late and such latecoming was basis in fact for the denial thereof. [R. 52-55] The Court of Appeals held that this was proper basis for the denial of the conscientious objector status. [R. 83-84]

Petitioner had a hearing in the Department of Justice before the hearing officer. He requested to be supplied with unfavorable evidence appearing in the FBI report. [R. 19] The hearing officer did not inform petitioner of all the adverse evidence relied upon by him as a basis for the adverse recommendation. [R. 19, 52-55] The recommendation of the Department of Justice was that the conscientious objector claim be denied. [R. 52-55] The appeal board followed the recommendation. [R. 19, 41] The court below held this was no violation of the rights of petitioner. [R. 85]

Upon the trial petitioner subpoenaed the production of the secret FBI investigative report. [R. 5-6] The Government made a motion to quash the subpoena. [R. 3] An affidavit was filed in opposition to the motion. [R. 6-9] The court quashed the subpoena *duces tecum*. [R. 9-10] The court below held that this was not reversible error. [R. 85-91]

SUMMARY OF ARGUMENT

ONE

The denial of the conscientious objector status and the final classification of I-A by the appeal board were without basis in fact, arbitrary and capricious.

Petitioner showed in the draft board file without dispute that he opposed participation in noncombatant and combatant military service. His papers established that this objection was based on belief in the Supreme Being. He showed that he was one of Jehovah's Witnesses and had received religious training and belief from Jehovah's Witnesses, supporting his conscientious objections. His opposition to the performance of military service was not based on political, sociological or philosophical views or a personal moral code. He brought himself squarely within the definition of a conscientious objector appearing in the act.

No one in the Selective Service System or the Department of Justice questioned his good faith or contradicted the documentary proof submitted by him. The report of the hearing officer and the recommendation of the Department of Justice were not based upon any disbelief of the statements made by petitioner. They recommended against the conscientious objector claim because petitioner was a late-comer to Jehovah's Witnesses and acquired his conscientious objections too late to be considered based upon religious training and belief.

The petitioner discharged his burden before the draft board when he showed by the undisputed evidence that he was a conscientious objector. The law did not put a greater burden upon him and require him to "convince the members" of the board. The members of the board were impossible to be convinced, irrespective of the undisputed evidence. This makes necessary judicial review and a finding of no basis in fact.

There was no weighing of the evidence. The reason is that there was no conflict in the evidence on the conscientious objector claim. By answering the questions, filling out the form properly and supporting it by proper papers petitioner discharged his burden of proof. The burden then shifted to the Government to contradict the statements appearing in his draft board file. The papers that he signed and filed were not mere claims. They were evidence. Petitioner could be prosecuted for falsely answering the questions. These statements made under the pain of liability for false swearing were not contradicted by the Government. Petitioner discharged his burden. The Government failed to meet its burden by rebutting the undisputed proof submitted by petitioner. The rule of *Dickinson v. United States*, 346 U. S. 389 (1953), applies. (*Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93, 96; *Weaver v. United States*, 8th Cir., 1954, 210 F. 2d 815, 822-823; *Jessen v. United States*, 10th Cir., 1954, 212 F. 2d 897, 900; *United States v. Hartman*, 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; *United States v. Pekarski*, 2d Cir., 1953, 207 F. 2d 930; *United States v. Wilson*, 7th Cir., 1954, 215 F. 2d 443, 446) That the *Dickinson* case, *supra*, dealt with the ministerial status and not the conscientious objector claim makes no difference.

The act makes no distinction between the quantum of proof made to support the conscientious objector claim and the ministerial claim. The only difference between the two is the extensive FBI investigation and the recommendation by the Department of Justice. Unless the Department of Justice turns up some contradictory evidence the situation is the same. Congress did not intend to put a greater burden of proof upon the conscientious objector than any other claimant of classification. In the condition of the record in this case with no contradictory evidence the rule of *Dickinson v. United States*, *supra*, applies.

There is no judging of the credibility of petitioner. At no time did any member of the Selective Service System or the Department of Justice accuse him of lying. No memorandum of lack of credibility was made in the draft board files. It cannot be assumed or speculated that the draft board judged his credibility. The appeal board did not have an opportunity to interview him. The Department of Justice did not say that he was lying. It requires the wildest sort of speculation to say that he was found to be unbelievable.

The conscientious objector claim does not involve probing a man's conscience and is not a speculative venture. It is susceptible of exact proof, the same as any other claim. The word "conscientiously" merely means that one has taken the stand of opposition to war sincerely. "Sincerely" means that he is not a hypocrite and is not lying in his claim. The Government does not claim that Simmons was a hypocrite or that he lied in making his claim. It must be assumed, therefore, that he is sincere. The recommendation of the Department of Justice, that petitioner was a late-comer and had not had sufficient religious training, was not enough to contradict the undisputed evidence that he was a conscientious objector.

Permission of judicial review and the application of the doctrine of no basis in fact (*Estep v. United States*, 327 U. S. 114 (1946); *Dickinson v. United States*, 346 U. S. 389 (1953)) in conscientious objector cases, the same as in other prosecutions, will not result in a mass conversion of males for the purpose of draft evasion. The facts in the records of the various religious organizations prove to the contrary. This could be said of all exemptions that are provided for in the act. This type of argument could be made against the court's applying a no basis in fact rule for any exemption or deferment provided for by law. Rather than stretch the "no basis in fact" rule so as to prevent judicial review the remedy to prevent evasion of

the law is to prosecute for making false statements. The act provides for prosecution for false statements made by registrants. The failure of the Government to accuse Simmons of making false statements should be taken as a confession by the Government that there is no untrue statement made by Simmons in the draft board file. Assuming that he has made no untrue statements, then it must be assumed that the record in his case indisputably establishes his conscientious objections. The burden was upon the Selective Service System to rebut his statements. Having failed to do this the Government cannot contend that there is basis in fact. This is especially true when the only factual basis relied upon by the Government is the fact that Simmons was a late-comer to the religion of Jehovah's Witnesses and took on his conscientious objections after he was classified.

The report of the Department of Justice, referring to the secret FBI investigative report about Simmons' previously having been a heavy drinker and gambler, is irrelevant and immaterial. To begin with, the report antedated by a long time the date when he became a conscientious objector. There is nothing in it to prove that at the time of his classification these statements applied against him. The reference to the abuse and physical violence toward his wife is questioned. The FBI report on its face does not constitute sufficient evidence to contradict what Simmons said in his file. (See *Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689.) This should not be relied upon as basis in fact, especially in view of the circumstance that the hearing officer did not give Simmons an opportunity to reply to it when he was before the Department for a hearing on his conscientious objections.

There was, therefore, a denial of the conscientious objector status without basis in fact.

TWO

Petitioner was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report used by the hearing officer and the Assistant Attorney General in the making of their recommendation under the act.

When petitioner had his hearing in the Department of Justice the hearing officer referred to only one part of the FBI report. It was that petitioner had hung around pool halls. No reference was made to the other adverse evidence. The hearing officer relied on other adverse evidence in his report. Petitioner asked the hearing officer if there was any other adverse evidence. The hearing officer did not answer his request. This was evaded by a statement that the hearing officer knew all the members of the Supreme Court of the United States. The report of the hearing officer was adverse.

It was unnecessary for Simmons to request a "summary" of the FBI report. He did enough when he asked for the unfavorable evidence. The hearing officer referred to some of the evidence but not all. Obviously he considered the request to be sufficient. The request was in accordance with the procedure then employed by the Department of Justice to provide only the general nature of the unfavorable evidence when requested.

It was held in *United States v. Nugent*, 346 U. S. 1, 6 (1953), that the law is complied with when the hearing officer supplies the registrant on request "with a fair résumé of any adverse evidence in the investigator's report." Petitioner requested additional unfavorable evidence. There was additional evidence relied upon by the hearing officer. He relied upon the mistreatment of petitioner's wife by petitioner as a basis for the adverse recommendation. Petitioner called for any more adverse evidence. The hearing

officer did not supply this piece of evidence. This was a deprivation of procedural due process of law.—*United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398; *Eagles v. Samuels*, 329 U. S. 304, 312-314 (1946); *DeGraw v. Toon*, 2d Cir., 1945, 151 F. 2d 778; *Levy v. Cain*, 2d Cir., 1945, 149 F. 2d 338; *United States v. Balogh*, 2d Cir., 1946, 157 F. 2d 939; *Chen Hoy Quong v. White*, 9th Cir., 1918, 249 F. 869, 870; *Bachus v. Owe Sam Goon*, 9th Cir., 1916, 235 F. 847, 853; *Chin Ah Yoke v. White*, 9th Cir., 1917, 244 F. 940, 942; *Mita v. Bonham*, 9th Cir., 1928, 25 F. 2d 11, 12; *Ohara v. Berkshire*, 9th Cir., 1935, 76 F. 2d 204, 207; *United States v. Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242; see also *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92 (1913); *Morgan v. United States*, 304 U. S. 1, 18, 19, 22 (1938); compare *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274, 290 (1924).

Petitioner never had an opportunity to see the report of the hearing officer or the recommendation of the Department of Justice relying upon the unfavorable evidence until after the classification by the appeal board. This was entirely too late for him to be apprised of the unfavorable evidence relied upon. The hearing officer was obliged to give him a summary of this when he was at the hearing. This was his only opportunity to be apprised of the unfavorable evidence under the procedure followed by the Department. There he had an opportunity to answer it, but the hearing officer denied him the right.

The mere asking of the general question by the hearing officer did not constitute a full and fair summary of the unfavorable evidence. Asking of questions is not a summary. The questions asked did not even relate to the unfavorable evidence. The hearing officer was not called as a witness for the respondent. The failure of the hearing officer to be called to contradict the testimony of the petitioner gives rise to a presumption that what the petitioner said was true.

The case of *United States v. Nugent*, 346 U. S. 1 (1953), did not decide that the law did not require the providing of the summary. The Court, to the contrary, indicated that due process of law was satisfied when the hearing officer provided a full and fair summary of the unfavorable evidence. (346 U. S., p. 6) That holding is not *obiter dictum*; it was a declaration of the law made by this Court in answer to the proposition that the entire FBI report should have been produced at the hearing.

There would have been no litigious interruption of the process of drafting by giving the petitioner a summary of the unfavorable evidence. He could have answered the unfavorable evidence in a few minutes. It would not have required a long, drawn-out litigious hearing where witnesses are summoned and cross-examination allowed. All that he wanted to do was to answer the unfavorable evidence. It was the responsibility of the hearing officer to give it to him. This was not done as it should have been under the *Nugent* case, *supra*, 346 U. S., page 6.

The Government was required to prove a *prima facie* case. As the petitioner was permitted to show that there were irregularities procedurally in the process of induction the petitioner met the burden placed upon him by showing that the hearing officer did not give a full and fair summary. The proceedings in the Department of Justice became a link in the chain of proceedings. The invalidity of the Department of Justice proceedings by failure to give a summary makes the entire proceedings void.—*Hinkle v. United States*, 9th Cir., Sept. 24, 1954. — F. 2d — ; *Clementino v. United States*, 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States v. Everngam*, D. W. Va., 1951, 102 F. Supp. 128; *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398.

The Department of Justice has since the *Nugent* opinion followed the procedure of making a full and complete summary of all the unfavorable evidence appearing in the

FBI report and mailing it to the registrants. This practice by the Department evidences an interpretation of the *Nugent* opinion that a full and fair summary of all the unfavorable evidence appearing in the FBI report is necessary. The position of the Department of Justice in this case is inconsistent with that taken under the general practice fixed since the decision in the *Nugent* case.

The failure to give a full and fair résumé of the unfavorable evidence invalidated the draft board proceedings so as to require an acquittal in this case.

THREE

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report and prevented the use of the report at the trial for the purpose of determining whether the hearing officer had given a full and fair summary of the adverse evidence appearing in the secret FBI investigative report.

Petitioner subpoenaed the secret FBI investigative report at the trial. A motion to quash was sustained. Petitioner was denied the right to call for the FBI report at the trial for the purpose of showing its materiality and relevance.

The Court in *United States v. Nugent*, 346 U.S. 1, 6 (1953), stated that the proper procedure required the giving of a full and fair résumé of the unfavorable evidence. The trial court was required to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequately provided by the hearing officer. The trial court could not discharge its judicial function without seeing the FBI report. The report could not be seen without admitting it into evidence. The petitioner could not offer it into evidence without having the subpoena sustained.

The position taken by the petitioner on this point is

supported by *United States v. Edmiston*, D. Neb., 1954, 118 F. Supp. 238, 240; *United States v. Evans*, D. Conn., 1953, 115 F. Supp. 340, 343; *United States v. Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States v. Stasevic*, S. D. N. Y., 1953, 117 F. Supp. 371; *United States v. Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States v. Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953; see also *United States v. Andolschek*, 2d Cir., 1944, 142 F. 2d 503, 506; *United States v. Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 78-79; read *United States v. Reynolds*, 345 U. S. 1, 12 (1953).

The order of the Department of Justice making the FBI report confidential (Department of Justice Order No. 3229 issued pursuant to 5 U. S. C. § 22) is waived by the Government when the FBI reports are used as a part of the administrative proceedings. The reports are used by the hearing officer and the Department of Justice in making its recommendation to the appeal board. The final recommendation is based upon the secret FBI investigative report. In the absence of a showing that a disclosure of the FBI report at the trial would endanger the national security it must be produced. No showing of danger to the national security can possibly be made in the case of a conscientious objector.

It is for the courts and not the Department of Justice to determine whether the FBI reports should be produced. —*Touhy v. Ragen*, 340 U. S. 462, 469, 472 (1951); *Bank Line v. United States*, 2d Cir., 1947, 163 F. 2d 133, 138, 139; *Zimmerman v. Poindexter*, D. Hawaii, 1947, 74 F. Supp. 933, 935; see the order of Attorney General Clark in Supplement No. 2, June 6, 1947, clarifying Order No. 3229, since repealed by an order dated January 13, 1953.

The order quashing the subpoena in advance of the trial cannot be sustained at the end of trial on the ground that there is basis in fact for the classification. Petitioner

was entitled to have a trial and a chance to test out whether the hearing officer gave him a full and fair summary when he was being prosecuted in the district court. For the judge to find that there was basis in fact for the conscientious objector status does not at all make harmless error the quashing of the subpoena.

There is no showing whatever in the record in this case that the hearing officer supplied petitioner with all the unfavorable evidence. This requires the court to conclude without seeing the FBI report that what the Department of Justice is telling the court is correct. It is up to this Court to say whether there is any unfavorable evidence in the FBI report. The only way this can be determined is by looking at the report and judging it with the testimony given by the petitioner as to what evidence was given him by the hearing officer. The Department of Justice was not required to make a statement in its recommendation to the appeal board of all the adverse evidence. It had the FBI report before it. There may have been an unlimited amount of evidence not mentioned in the report but which was actually relied upon in reaching the conclusion that the conscientious objector claim be denied.

It cannot be said that the FBI report was irrelevant and immaterial to the issue. It should be remembered that the court below quashed the subpoena. Neither the trial court nor petitioner's counsel had an opportunity to examine the FBI report. It could not be called for. Since the issue here is the error of the court in quashing the subpoena rather than in excluding the FBI report called for in the subpoena, it must be conclusively assumed that the FBI report was relevant and highly material. The only problem here is whether the court erred in quashing the subpoena. The issue is not whether the FBI report is relevant and material. The question is whether the court had any justification for quashing the subpoena. None appeared in law or in fact. The court below was in error in affirming the

order quashing the subpoena and refusing to reverse and remand the case for new trial.

What this Court held in *Gordon v. United States*, 344 U. S. 414, 418-420 (1953), is applicable. There the Court held that it was unnecessary to say whether the evidence was material. The question was whether the court erroneously refused to compel the production of documentary evidence. Since the evidence was unknown to the court it was held that the court could not say whether it was material or immaterial. This Court said: "The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error."—344 U. S., at p. 420.

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling or the action of the court below in affirming the order quashing the subpoena.

FOUR

In the event this Court concludes that the order sustaining the motion to quash in this case is proper and no error was committed, then petitioner requests this Court to reconsider and reverse its ruling in *United States v. Nugent*, 346 U. S. 1 (1953).

ARGUMENT

ONE

The denial of the conscientious objector status and the final classification of I-A by the appeal board were without basis in fact, arbitrary and capricious.

The documentary evidence submitted by the petitioner establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant mili-

tary service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry. [R. 46-50, 53-55]

There is no question whatever on the veracity of the petitioner. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file, disputing petitioner's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove petitioner was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that petitioner was willing to do military service. All his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. The petitioner did not suggest or even imply that he was willing to perform any military

service. He contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

No one questioned the good faith of petitioner in becoming one of Jehovah's Witnesses. His good faith in becoming one of Jehovah's Witnesses is not disputed in the evidence. There is absolutely no evidence whatever that he fictitiously or fraudulently assumed the robe of conscientious objection believed by Jehovah's Witnesses for the purpose of evading military service. The conscientious objector form and the evidence completely corroborated his bona fide beliefs as one of Jehovah's Witnesses.

It is arbitrary and capricious for the hearing officer to reject all the undisputed evidence purely because petitioner was a late-comer to Jehovah's Witnesses. Religions of all denominations are constantly acquiring new converts and losing old worshipers. There is a constant turnover of membership among the various religions. This is going on in time of war as well as in time of peace. Since the practice is not criticized and the change of religions is not evidence of bad faith in time of peace, then by force of the same reason a change of religions from a nonpacifist group to a religion believing in conscientious objection is valid and lawful. This change cannot be held to be *per se* fraudulent or in bad faith.

This proposition has been more extensively argued in the brief for petitioner in the companion case of *Gonzales v. United States*, No. 69, October Term, 1954, at pages 41 to 51, to which the Court is here referred.

In its opinion (213 F. 2d 901, 902) the court below admits that Congress afforded greater strength to freedom of conscience than to universal participation in the armed forces; yet the entire opinion runs counter to this admission of the congressional intent. It admits the exemption but then does everything within its power to water it down and make it impossible to protect the conscientious objector status in the courts.

The court below states (213 F. 2d, at p. 903): "The

teachings applicable to the general field of administrative law are of little aid in judicial review of orders issued by selective service agencies." It is true, of course, that the scope of judicial review is greatly restricted in selective service cases as far as classification is concerned. In other words, there is a "no basis in fact" rule rather than the "substantial evidence" rule or the "greater weight of evidence" rule found in other administrative agency decisions. That is admitted.

There is a great difference between the scope of review for the purpose of upsetting a determination by a draft board and the determination of some other administrative agency. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U.S. 114, 123 (1946).) Notwithstanding this limitation placed on the judicial review of a determination, the fact remains that procedural due process of law must be strictly adhered to. In fact, the rule is stated in *N. L. R. B. v. Cherry Cotton Mills*, 5th Cir., 1938, 98 F. 2d 444, 446, as well as many other cases, that where the scope of review is very narrow and restricted, then the need for an insistence on strict compliance with the procedural regulations must be followed even in draft cases. (See *Ver Mehren v. Sirmyer*, 8th Cir., 1929, 36 F. 2d 876, 881, and *United States v. Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 92.) These cases hold that there must be a full and strict compliance with the procedural regulations. There are many other cases involving procedural violations that prove this rule.

The court below has obviously confused the difference between the scope of review in the matter of determining the classification or in reviewing the administrative agency determination with that of procedural due process of law. It uses illegally the limited scope of judicial review applicable to a review of classification and applies the same rule to say whether procedural rights have been violated.

-At 213 F. 2d 901, 903, the court below states: "... the

burden is on the ~~claimant~~ to prove himself to be within the group entitled to claim the privilege." The way it discusses this burden it makes it impossible for any registrant who claims to be a conscientious objector to be ever classified as such. It not only puts the burden on the registrant to prove his case but goes a step farther and puts a much greater burden upon the registrant. It is to convince the members of the board that he is entitled to the classification. The court below holds that if he fails to convince the members of the local board or the appeal board of his right to the classification he has not discharged his burden of proof.

The court below says that the courts *may not weigh the evidence*. (213 F. 2d, 903) It has confused and obviously stretched the rule of not weighing evidence out of its proper setting. There is no *weighing* of the evidence unless there is some *conflict* in the evidence. Where there is no conflict in the evidence (and this would include a conscientious objector case) it cannot be said that courts are called upon to weigh the evidence in prosecutions under the act.

The plain answer to all this argument made by the court below is that when a party before an administrative agency has discharged his burden of proof, then the burden shifts. It passes to the other side. One party in a draft case is the registrant. The other party is the Government. The Government has supplied certain forms calling for certain answers. These answers are designated by series and are designed to determine whether a registrant meets the requirements of the statute for exemption or deferment. If a registrant (1) properly and fully answers the questionnaire and the conscientious objector form, (2) shows that he meets the requirements of the statute and (3) this evidence is not impeached or contradicted, he has met the requirements of the statute and regulations. Such registrant has then and there discharged his burden of proof before the administrative agency. When he has done that the burden shifts to the Government. Unless the Government

has some evidence to contradict his statements or until the draft board itself makes a positive finding that it disbelieves the registrant, it cannot be said that there is any basis in fact for a denial of the conscientious objector claim. In such a situation it cannot be said that the registrant has failed to discharge his burden of proof.—*Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691; *Kulick v. Kennedy*, 2d Cir., 1946, 157 F. 2d 811, 814-815.

Nowhere in its opinion does the court below attempt to give any reason why the rule of the *Dickinson* case (346 U. S. 389 (1953)) does not apply in conscientious objector cases. (See 213 F. 2d, at p. 903.) Yet other courts of appeals have held so. Indeed, it specifically disagrees with several other courts of appeals that have held that the rule in the *Dickinson* case does apply.—*Jewell v. United States*, 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman v. United States*, 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93, 96; *Weaver v. United States*, 8th Cir., 1954, 210 F. 2d 815, 822-823; *Jessen v. United States*, 10th Cir., 1954, 212 F. 2d 897, 900; *United States v. Hartman*, 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; see also *United States v. Pekarski*, 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs v. United States*, 8th Cir., 1953, 208 F. 2d 329, 331-332; cf. *United States v. Close*, 7th Cir., 1954, 215 F. 2d 439, 441-442; *United States v. Wilson*, 7th Cir., 1954, 215 F. 2d 443, 446.

At page 904 of 213 F. 2d, the court below makes a review of the *Dickinson* holding. (346 U. S. 389 (1953)) The purpose of its review is to show that in the case of the ministerial claim there is a "... factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities." It then, by contrast, states that there cannot be a search of conscience. It says that this is because "conscientiously" is a term that is entirely subjective. This is a factitious conclusion. It is a very specious argument that flies directly into the face of the facts. The Government has certain forms that call for answers

and the evidence presented is the basis for determining whether a registrant meets the statutory requirements. The registrant in answering the questions shows whether he fits the statute.

Also, there is the extensive FBI investigation as required by Section 6(j) of the act. There is the hearing before the hearing officer of the Department of Justice. This results in a determination and recommendation as to whether the registrant is a hypocrite or is lying and has done things that are inconsistent with his conscientious objector claim. A bald and sophisticated conclusion is reached by the court at the outset. This is reached in order to achieve the end that there cannot be any exact determination in a conscientious objector case.

The law makes no distinction whatever, as to the burden of proof, between a conscientious objector and a minister, a congressman or a judge. Had the law intended to put a greater burden in making proof upon the conscientious objector it would have been so stated. Congress did not state it. The President and the Selective Service Regulations did not state it. When the conscientious objector form shows, therefore, that a conscientious objector fits the statute and also the FBI report fails to come forward with any contradictory evidence, it must be concluded that there is no basis in fact for the denial of the conscientious objector status.

Therefore, it is plain that the effort of the court below to make distinction of the *Dickinson* case (346 U. S. 389 (1953)) is absolutely wrong. It flies into the face of everything that is fair and reasonable. If this conclusion is right then it will never be possible for any conscientious objector to contend that there is no basis in fact for denial of his conscientious objector claim, regardless of what the facts may be.

The court below talks about the board being able to judge the credibility and demeanor of the conscientious objector in a personal appearance. (213 F. 2d, p. 904) This

is true in the case of all registrants. It is not confined to a conscientious objector. The local board has the right to judge the credibility. However, unless the local board determines and writes into the record that the registrant is lying it must be assumed that his statements are true. (*Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691; *Kulick v. Kennedy*, 2d Cir., 1946, 157 F. 2d 811, 814-815) Then there is no question as to his credibility on the factual statements in his answers. This applies in the case of conscientious objectors as well as in the case of ministers, congressmen or any other registrants.

The argument that the local board has the opportunity to judge credibility (213 F. 2d, p. 904) goes out the window when it is considered that the final and last classification was that of the appeal board. The appeal board did not have the opportunity to interview the registrant. Unless the Department of Justice has reported that it turned up evidence of lying or unless the local board has made a memorandum in the draft board file that it disputes and denies the credibility of the registrant who is claiming to be a conscientious objector, it must be said that there is no challenge in the administrative agency as to the veracity of the claimant.

The fallacy of the process employed by the court below in reaching a basis in fact for the denial of the conscientious objector status is demonstrated by a note in 102 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 694, 697 (March, 1954):

"If the board were permitted to base a denial of exemption on unexplained disbelief of the testimony presented to it, judicial review would be ineffective to enforce the statutory exemptions and protect the individual registrant. The most arbitrary denial would be indistinguishable on the record from any other action of the board and "no basis in fact" would become an *empty protection* if satisfied by *demeanor evidence*. Where a *prima*

facie case for exemption has been made, any additional burden which the requirement of affirmative evidence places upon the local board is a burden which the board should be expected to shoulder. In view of considerations of due process existent in all cases, and of personal liberty and freedom of religious beliefs particularly involved in ministerial and conscientious objector cases, the requirement of some affirmative evidence in support of the classification seems to be the minimum requirement consonant with judicial protection of registrants from unwarranted refusals to grant the exemptions provided by the Act."—Emphasis added.

The court below contends that the conscientious objector claim "admits of no such exact proof" and that "probing a man's conscience is, at best, a speculative venture." Read its discussion at 213 F. 2d, p. 904. This is wrong. Also erroneous is the statement about credibility and demeanor, heretofore discussed.

The word "conscientiously" used in the statute is not a vague and indefinite dragnet. The use of this word does not give unlimited and unreviewable authority in the administrative agency. The word "conscientiously" merely means that an action is taken sincerely. The word "sincere" means that a man is not a hypocrite and is not lying in his claim. It means he is true and honest. It must be concluded that a man is not a hypocrite and is not lying and is sincere as long as his answers bring him within the provisions of the statute and the draft board has not stated expressly that it did not believe the registrant.

Even an adverse recommendation by the hearing officer does not, in every case, mean that the believability of the registrant is questioned. The hearing officers of the Department of Justice make written reports to the Assistant Attorney General in Washington. In the recommendations of the Department of Justice to the appeal boards it will

be always stated by the Assistant Attorney General whether the credibility of the registrant is doubted. If he does not expressly state that the conscientious objector is lying then it must be said that the recommendation was limited to the reasons expressly stated in the report. In each case where denial of a claim is recommended the reports usually have been that the registrant's training has been too recent, or that he believes in self-defense or theocratic warfare, or is willing to work in a defense plant, or to work on a farm or do some other work that contributes to the war effort. It is said that these justify the denial of the conscientious objector claim. Such adverse recommendation, based as it is on expressed grounds, would not amount to a challenge of the believability and credibility of the conscientious objector. There must be an expressed challenge of the believability. Purely because the Department of Justice recommends against the claim does not mean that the credibility of the registrant has been challenged, unless the credibility is expressly attacked.

The statement by the court below (213 F. 2d, p. 905), that it is necessary to "determine subjectively" the conscientious objection, is absolutely wrong. It is erroneous to assume that Congress entered into a field and dealt with it in such manner that it requires a practitioner of the occult science, a fortuneteller or a mind reader before such conclusion could be reached. This opinion by the court below leaves this field of law in a state of confusion and guesswork. Every man's guess is as good as that of another, the court below says. It becomes purely a matter of speculation and not a matter of exact determination. Congress did not treat it as such. The Selective Service System does not. The forms in the Selective Service System call for answers that determine whether a registrant fits the statutory requirements. The Department of Justice investigating procedure and its report pursuant to Section 6(j) of the act and the files of the local board are enough to show that it is not a subjective matter.

It is argued by the court below (213 F. 2d, p. 905) that there would be "mass conversion of males" if its conclusion is not sustained. This is entirely erroneous. It then talks about the temptation being ever present to make the members of any sect claiming conscientious objection a group of evaders. This is merely scare-talk. It has no basis in fact and nothing to do with reality. This argument could be made against any exemption that is permitted in the law. It is out of place in judicial proceedings. It would sound better if made in Congress or on the hustings. Congress rejected it by making each exemption and deferment.

There is a plain difference between avoiding military service by a proper exemption or deferment provided by law and evading military service. It is legal to *avoid* it by proper classification and illegal to *evade* by false statements and other such illegal methods. Yet the court below puts all in the same basket!

When a registrant makes a false statement he can be prosecuted for telling the draft board a lie. This is the better remedy than stretching the basis-in-fact rule so far as to break it and make it impossible for a conscientious objector case to be reviewed in the courts.

The court states (213 F. 2d, p. 905): "We could, under such circumstances, impose on the board the burden of making a record to support its order." It does not state the circumstances. Seemingly it would never be possible, under the circumstances termed "such circumstances," for a court to command a draft board to make a record to support its order. The court seemingly is confining this rule to the *Dickinson* case as to the ministry exemption and other classifications. But it excludes it from the conscientious objector. Why? Whatever be its purpose, it is wrong. A draft board must make a record in every case. There is no exception to this rule in the case of any registrant's claim that is denied. This rule is expressed in the *Dickinson* case.—346 U. S. 389 (1953).

The court below (213 F. 2d, p. 905) says that the *Dickinson* opinion "... does not impose on the boards the burden of rebutting every claim made irrespective of the proof offered by the applicant." It then states that if that were done it would convert a privilege into a right. This is very factitious and a false type of reasoning. The privilege granted by Congress must be protected and procedural due process of law must be complied with in "privilege" cases as well as "right" cases. To say that a registrant is entitled to have a fair hearing but that due process of law can be violated (by allowing a draft board to make a determination that flies in the teeth of the evidence by speculation and other type of guesswork) is a rank surrender of judicial responsibility. The *Dickinson* decision (346 U.S. 389 (1953)) (contrary to the court below, according to other courts of appeals and the dissenting Justices in the *Dickinson* opinion) does impose "... on the boards the burden of rebutting every claim made ..." when there is proof offered by the registrant that he fits the statutory requirements for exemption or deferment.

The court below (213 F. 2d, pp. 905-906) discusses the facts in this case. After all the talk it winds up with only one basis for the denial of the conscientious objector status. It is that the petitioner was a late-comer to Jehovah's Witnesses. It then (213 F. 2d, pp. 906-907) states that "... the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status." The court, however, then proceeds to rely on the late-comer argument primarily as basis in fact for the denial of the classification. This is an inconsistent argument at its best. It fails to point out any other factor whatever in the file (except the illegal FBI report) that would justify the denial of the conscientious objector status.

The court next states (213 F. 2d, p. 906) that the local board should not be deprived of "... any valid inference in ruling on classification questions." No circumstances are

cited that justify any inference that Simmons was telling a lie. The Department of Justice in its report to the appeal board did not say that Simmons was lying.

The court then speaks of certain negative circumstances relied upon by the Government. But after all is said and done, this argument comes back to the fact that Simmons was a late-comer. The FBI report is referred to. The court then states: "No other members of the sect appeared in his behalf." (213 F. 2d p. 906) However, this is an argument that the draft boards did not raise. Unless the Selective Service System has questioned the failure of others to make statements and has asserted that no others supported the claim, how can the court below speculate and say this was the basis in fact relied upon by the local board or the appeal board?

Now comes the real basis for the denial of the conscientious objector status by the holding that there was basis in fact, according to the court. It states: "Considering his claim *in the light of those of other members of the sect*, as the board was entitled to do, on the evidence of record, we cannot say that its denial of his claim is without basis in fact." (Emphasis added.) (213 F. 2d, p. 906) This quotation shows that the court below was speculating that the board must have known what others of Jehovah's Witnesses have said to other boards in other cases. The court below held in *Hull v. Stalter*, 7th Cir., 1945, 151 F. 2d 633, 637, that there could not be a determination of a registrant's classification according to the status of other persons. This rule was established by the court years ago. There cannot be a classification according to class. There must be individual classification and individual determination according to the facts in each registrant's case. The court below ignored this rule in this case.

In one breath the court below states that no other members of the sect appeared in Simmons' behalf. Then in the next breath it says that the board had the right to consider what other members have said in other cases as a basis for

the denial of the conscientious objector status. It does not want to use the other members except for the purpose of driving a spike into Simmons in the case. To sustain thereby illegally the invalid stand, the court has taken that position on the law applicable in this case.

In holding that Simmons was not sincere and that there was basis in fact for the denial of the conscientious objector status the court entirely ignored the report made by the hearing officer of the Department of Justice. It also relied upon the recommendation of the Department of Justice made to the appeal board. That shows, however, that Simmons was a bona fide member of Jehovah's Witnesses. The Department's report fails to state that there was an impeachment or contradiction of the statements he had made in his file showing that he was a conscientious objector. [R. 52-55]

The court turns then to certain "evidentiary factors" reported by the Federal Bureau of Investigation. (213 F. 2d, p. 906) It is the FBI report of Simmons' reputation as being a heavy drinker and gambler. There was no other evidence that Simmons gambled. The report showed that Simmons hung around pool halls before he became one of Jehovah's Witnesses. This informant reported the drastic change in Simmons' life and believed him sincere. [R. 53-54] The court then refers to abusiveness and physical violence toward his wife. The truthfulness of these FBI reports is questioned. The fact remains that the FBI reports do not constitute sufficient evidence to deny the conscientious objector classification in this case. (See *Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691.) The court refers to the police records turned up by the FBI, but none of this was gone into at the hearing. All of this has been relied upon as a basis for saying that the denial of the conscientious objector status was justified, and it presents the procedural due process argument that will be made later in this brief.

It is respectfully submitted that there was no basis in

fact for the denial of the conscientious objector status.

T W O

Petitioner was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report used by the hearing officer and the Assistant Attorney General in the making of their recommendation under the act.

The undisputed evidence in this case shows that the petitioner upon the occasion of his hearing in the Department of Justice requested to know all the unfavorable evidence in the FBI report. [R. 19] In response the hearing officer referred to only one item of unfavorable evidence. He told petitioner that he had been hanging around pool halls. [R. 19] There was no reference whatever to all the other adverse evidence appearing in the FBI report that was used by the hearing officer and by the Assistant Attorney General in making their recommendations to the appeal board. [R. 19]

The record in this case shows that Simmons did voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook, by questions that disarmed Simmons, to refer to the adverse evidence appearing in the report. Simmons did not waive the right to have the full and fair résumé.

Simmons did ask for the FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked for all the regulations that the Department of Justice would allow at the time.

The Government may place stress upon the fact that the petitioner in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. (See APPENDIX A to this brief, pp. 74.) This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the petitioner failed to request a summary) should be rejected.

It should be remembered that the Court held in the *Nugent* case (346 U.S. 1, 6 (1953)) that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (to which the *Nugent* case held they were entitled), failure to comply with the notice sent was not a waiver of the right to insist on a summary of the FBI report.

Regardless of whether the request for the summary of the unfavorable evidence was made it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure that it followed before the *Nugent* decision and in this case does not meet the requirement of due process of law and Section

6(j) of the act.—See APPENDIX B to this brief, pp. 75.

The Government argued below that it was not necessary for the hearing officer to supply the registrant with a summary of the FBI report. It is said that *United States v. Nugent*, 346 U. S. 1, 6 (1953), does not hold this. The Department of Justice has recognized the effect of the decision in *United States v. Nugent*, *supra*, to require the production of a summary of the FBI report. This is shown by the instructions that have been sent out to registrants since September, 1953, following the decision in the *Nugent* case. (See APPENDIX A and APPENDIX B to this brief, pp. 74, 75.) These new instructions sent by the Department of Justice to the registrants show that it is the policy of the Department of Justice to give the registrants a full and fair summary of the entire FBI report. The summary is not confined to the unfavorable evidence. The exact holding of the *Nugent* case (346 U. S. 1, 6 (1953)) does not go so far as the Department of Justice instructions indicate that it went. At least the holding in the *Nugent* case requires the hearing officer to supply the registrant only “. . . with a fair résumé of any adverse evidence in the investigator's report.”—346 U. S. 1, 6.

The report of the hearing officer to the Department of Justice was adverse. Just to what extent he relied on the extensive adverse evidence appearing in the FBI report is not clear. It does appear, however, that there was more adverse evidence in the report than he gave to Simmons at the hearing. Under these circumstances it is clear, therefore, that he failed to give Simmons a full and fair résumé of the adverse evidence appearing in the report. The principle announced by the Court in *United States v. Nugent*, 346 U. S. 1, 6 (1953) was not complied with. The contention here that the petitioner was denied a full and fair hearing upon the appearance before the hearing officer is supported by the new regulations of the Department of Justice. These new regulations require that the registrant be supplied with a full and complete summary of the entire FBI

report. It was at least the duty of the hearing officer to supply a summary of all the adverse evidence.—*United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398.

In *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398, it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant.

The court in *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 399, distinguished the decision in *Imboden v. United States*, 6th Cir., 1952, 194 F. 2d 508, certiorari denied 343 U. S. 957 (1952), on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States v. Annett*, W. D. Okla., 1952, 108 F. Supp. 400, 403; reversed on other grounds, 10th Cir., 1953, 205 F. 2d 689.

In *Eagles v. Samuels*, 329 U. S. 304, 312-314 (1946) the Court approved the use of the theological panel. The panel made a report that was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "... be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., p. 313) See also *DeGraw v. Toon*, 2d Cir., 1945, 151 F. 2d 778; *Lery v. Cain*, 2d Cir., 1945, 149 F. 2d 338; *United States v. Balogh*, 2d Cir., 1946, 157 F. 2d 939; judgment vacated, 329 U. S. 692 (1947),

affirmed on other grounds, 2d Cir., 1947, 160 F. 2d 999.

It was long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong v. White*, 9th Cir., 1918, 249 F. 869, 870, is one of the first cases decided by the courts on this point. In that case the court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. The court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus v. Owe Sam Goon*, 9th Cir., 1916, 235 F. 847, 853; *Chin Ah Yoke v. White*, 9th Cir., 1917, 244 F. 940, 942; *Mita v. Bonham*, 9th Cir., 1928, 25 F. 2d 11, 12; *Ohara v. Berkshire*, 9th Cir., 1935, 76 F. 2d 204, 207; compare *United States v. Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States v. Ju Toy*, 198 U. S. 253, 263 (1905)) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment, guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92 (1913)) The Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 182 (1938).

Another important case on this subject is *Morgan v. United States*, 304 U. S. 1 (1938). That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party

and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabando Societa v. Elting*, 287 U. S. 329, 335-336 (1932).

In *Kwock Jan Fat v. White*, 253 U. S. 454 (1920) it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274, 290 (1924), it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U. S. 88, 93 (1913).

The sending of the letter of recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice that the registrant attends. Petitioner had no opportunity to see the recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The petitioner was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous to conclude that the adverse evidence in the FBI report was made available to the petitioner. It was not made available until it was entirely too late for him to do anything about the appeal board determination.

The petitioner had the right to see his file after the appeal board finished with it and returned its denial of his conscientious objector claims. But this was entirely too late, because there was no chance for the petitioner to get the appeal board to reconsider his classification.

A speculative argument was made by the Government. It was said that the appeal board acted only on the adverse evidence of the FBI report, which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.--*United States v. Alvies*, N. D. Cal. S. D., 1953, 112 F. Supp. 618, 624; *Estep v. United States*, 327 U. S. 114, 121-122 (1946).

It was stated by the Government below that the hearing officer discussed fully with the petitioner the unfavorable evidence that appeared in the investigative report of the FBI. This statement is erroneous. There is no support in the record for such statement. This Court, moreover, has the responsibility of determining this question. This cannot be settled in this record, because the trial court quashed the subpoena and refused to compel the production of the FBI report to determine whether or not the hearing officer had done what the Government says he did.

It should be remembered that the hearing officer was not called as a witness for the Government at the trial. The failure on the part of the Government to call the hearing officer, to contradict the testimony of the petitioner, gives rise to a presumption that his testimony would have supported petitioner, that he did not give a full and fair

summary of the unfavorable evidence.—*United States v. Di Re*, 332 U.S. 581, 593 (1948).

In that part of the opinion by the court below about whether the FBI report should be produced and a full and fair summary of the secret report given to the registrant at the hearing before the hearing officer, the court refers to the case of *United States v. Nugent*, 346 U.S. 1 (1953). (213 F. 2d, p. 907) It acknowledges the argument made by Simmons that the *Nugent* decision required that he be given a full and fair summary of all the unfavorable evidence against him. The court below then quotes extensively from the *Nugent* opinion. (213 F. 2d, p. 907-908) It relies heavily upon that part of the *Nugent* opinion where it is stated: "... the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. . . . It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue."—213 F. 2d, p. 907.

The court below then quotes from the *Nugent* opinion, where it is stated that the Department of Justice "... satisfies its duties under §6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer . . . and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report." (213 F. 2d, p. 908) But the court below says this quotation is *obiter dictum*.

The issue before the Court in the *Nugent* case was only whether the Department of Justice should have given to the registrant the full FBI report. There was no issue of a full and fair summary raised by *Nugent*. As an answer to the argument that the full and complete FBI report should be produced, the Government argued that the "fair and just" provisions of the act and due process of law under the Fifth Amendment were complied with when a "full and fair"

summary of the unfavorable evidence was given to the registrant. This Court determined as a fact that in the *Nugent* case there had been a compliance with this minimum requirement.

It is difficult if not impossible to understand how the court below can hold that this is not a part of the holding of this Court. Yet it says that requiring the full and fair résumé of the unfavorable evidence contained in the FBI report is *obiter dictum*. Nevertheless, it should be emphasized that the issue in the *Nugent* case was whether (1) the entire FBI report should have been given to the registrant or (2) only a full and fair summary of it. This Court held that a full and fair résumé was the answer to the contention made by Nugent and Packer. Their contention was that they had been deprived of due process of law and of a full and fair hearing when they were not supplied the full FBI report. It is plain, therefore, that the court below is in error when it says that the quotation above, made from the *Nugent* case, is *obiter dictum*. It was the very basis of the entire opinion.

The court below says that the issue before this Court in the *Nugent* case was the question of whether or not the withholding of the secret FBI report was constitutional. That, of course, was one of the arguments, but it was only one. Do not overlook the fact that another argument was made. It was that the act of Congress and the "fair and just" provisions of the act, as well as the regulations themselves, contemplated (when properly construed) that the FBI report should be supplied to the registrant upon the hearing within the Department and before the hearing officer. There was, therefore, a question of congressional intent and statutory structure involved before the constitutional question was reached.

It was also argued (as an alternative) in the *Nugent* case that due process of law under the Fifth Amendment required the full FBI report to be produced. The statement made by the court below (213 F. 2d, p. 908), consequently

is not accurate. There were broader issues involved than the mere constitutionality of the statute and the regulations denying the FBI report to the registrant at the hearing within the Department of Justice. There was a question of statutory construction and of congressional intent involved in the *Nugent* case.

The court says that (in determining whether a full and fair summary should be given) a line must be drawn between "sham" and "litigious proceeding." (213 F. 2d, p. 909) These words came from the *Nugent* opinion. It then states that the *Nugent* opinion calls for minimum safeguards that will afford the registrant due process of law.

It is next stated by the court below that the *Evans* case (D. Conn., 1953, 115 F. Supp. 340) and other cases following it (where the subpoena for the FBI report has been sustained) are erroneous. (213 F. 2d, p. 909) It states that they were on the theory that the courts misinterpreted the *Nugent* opinion calling for a "full and fair summary by the hearing officer." The court says that the conclusion reached in those cases is predicated on error.

The court below argues that it is error to say that the Government has the burden of proving the validity of the classification on which the induction order is based. This is itself an erroneous concept. The Government in a criminal case must prove a *prima facie* case. If there are present in the *prima facie* case irregularities (or the undisputed evidence shows that there is violation of procedural due process regardless of whether the Government has the burden or not) it is immaterial whether the Government has the burden in the administrative proceedings. The court below again expressly states that it cannot agree that the *Nugent* opinion calls for a full summary of the unfavorable evidence ". . . as an absolute criterion for measuring the legality of the Justice Department hearing."—213 F. 2d p. 909.

At 213 F. 2d, p. 909, the court below states a line should be drawn between "sham" and "litigious proceeding." This is

"... without regard to procedural rules to meet the requirements of basic fairness consistent with the limitation placed on the statutory provision of finality." The court makes a wrong analogy. It says that it is contended that "... the government must point to secret evidence to establish any basis in fact for a particular classification. . . ." This statement is erroneous. The error of this argument is that it has never been contended that the secret FBI investigative report may be used at the trial to show basis in fact or no basis in fact. It is fully agreed that the FBI report may not be produced by the Government at a registrant's trial for the purpose of establishing basis in fact.

The only purpose for which the FBI report is relevant at the trial is to determine whether a full and fair summary of the unfavorable evidence was given to the registrant. It has never been contended that the Government must use the FBI report to support the draft board classification upon review at the trial. The FBI report must and can only be used at the hearing that is conducted within the Department of Justice. The only use that can be made of the FBI report at the trial is to determine whether there has been a full and fair summary or an adequate summary of the adverse evidence appearing in the report given to the registrant at the hearing.

The illegal importation of this argument by the court below into this case shows the error that the court below has gotten into by its effort to get away from the requirement of due process of law in judicial proceedings in criminal cases.

The court below does admit that the *Nugent* decision requires that "... evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process. (213 F. 2d, p. 909) This is precisely what Judge Hincks said in the *Evans* case, which opinion the court below criticizes in its opinion. The court below rejects the argument of Judge

Hincks in the *Evans* case, D. Conn., 1953, 115 F. Supp. 340. —213 F. 2d, p. 909.

It was contended in the court below in this case that the hearing officer of the Department of Justice did not call to the attention of Simmons the unfavorable evidence on which the classification and induction order find support. The unfavorable evidence appearing in the FBI report that was relied upon by the Department of Justice was not called to Simmons' attention. It seems, therefore, that the court below has agreed with Judge Hincks in an interpretation of the *Nugent* opinion.

The court below holds that the hearing officer complied with the requirements imposed upon him and the Department of Justice by the *Nugent* opinion. It states: "By his own admission, he and his wife were asked questions relating to his abuse of her." (213 F. 2d, p. 910) The court says these questions were "sufficient to inform him of all adverse evidence." Asking of vague, indefinite and general questions by the hearing officer does not constitute a giving of a full and fair résumé of the unfavorable evidence.

After the hearing officer asked the vague and indefinite question of the wife about how Simmons was treating her, he was then again requested by Simmons to tell him all the adverse evidence. [R. 19] Then the hearing officer evaded him by talking about the large law firm with which he was associated and that he personally knew all the Justices of the Supreme Court of the United States. [R. 19] This type of evasion plus the general questions by the hearing officer certainly constitutes the rankest sort of unfairness. It certainly does not come up to even minimum standards of a full and fair summary commanded by the *Nugent* opinion.—*United States v. Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242; compare *White v. United States*, 9th Cir., Sept. 14, 1954, — F. 2d —.

The record shows that the hearing officer did not give a full and fair résumé of the unfavorable evidence. His statements at the hearing were evasive and illusive to the re-

quest made. Never did he answer the request that Simmons made to be supplied all the unfavorable evidence. Reliance by the Department of Justice upon the unfavorable evidence appearing in the FBI report in its recommendation to the appeal board shows that Simmons was harmed and injured by the failure of the Department of Justice to supply a summary of the unfavorable evidence.

The notice sent out by the Department of Justice to the registrant states his right to be supplied with a full and fair résumé of the adverse evidence. But was the mere asking of indirect general questions that could not give a résumé equivalent to the giving of a full and fair summary? A summary is a summary. A question is not a summary or a résumé! It is sophistry to the extreme to argue that a general question is equivalent to a full and fair summary of the contents of the unfavorable evidence appearing in the secret FBI report. When the court below states that Simmons was supplied with a full and fair summary by the asking of the question, there is a complete disregard of the record made.—213 F. 2d, p. 910.

The Department of Justice, since the *Nugent* opinion, has sent out notices to registrants (APPENDIX B, pp. 75-76) in which a *complete summary* is attached to the notice. This present policy of the Department of Justice is an interpretation of the *Nugent* opinion showing that a full and fair summary is necessary. The Department of Justice, therefore, in its memorandum to hearing officers, takes a position that is inconsistent with that taken by the court below in this case.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied petitioner due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion

and the conviction of the trial court constitute reversible error.

THREE

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report and prevented the use of the report at the trial for the purpose of determining whether the hearing officer had given a full and fair summary of the adverse evidence appearing in the secret FBI investigative report.

Upon the trial petitioner subpoenaed the secret FBI investigative report of the FBI. A motion to quash was made by the Government. [R. 3, 5-6] This was sustained. [R. 9-10] At the trial the petitioner was thereby denied the right to have the use of the secret FBI investigative report. See his affidavit in opposition. [R. 6-9] The trial court made no effort whatever to determine whether or not the report was material or relevant. This could have been determined only by compelling the production of it and examining the report at the trial after it was received into the evidence.

The only way that the court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the report produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the court. Unless and until the court sees and examines the FBI report and also unless and until petitioner sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The trial court could not discharge its judicial function and determine whether the summary required by the Court

in *United States v. Nugent*, 346 U. S. 1, 6 (1953), was fair and adequate unless and until the court had actually seen and examined the secret FBI report. In fact, petitioner's rights could not be preserved unless and until he had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Court in *United States v. Nugent*, 346 U. S. 1, (1953), dealt only with the contention that the complete FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of the *Nugent* decision, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a *summary* of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the petitioner are claimed to be confidential by Department of Justice Order No. 3229 (issued pursuant to 5 U. S. C. Section 22) they must be produced, because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Order No. 3229 has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *Knauff v. Shaughnessy*, 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. See what Mr. Justice Frankfurter said in his dissent at page 549 and what Mr. Justice Jackson declared in his dissent at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty, on the ground of mere administrative privilege without some good ground for it, is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172 (1951). That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the petitioner. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 is sufficient to overcome the requirements of the Constitution, and "fair play." However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party

of the right to see and use documents. That was decided in *Touhy v. Ragen*, 340 U. S. 462, 469 (1951). See what Mr. Justice Frankfurter said in a concurring opinion at page 472.

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line v. United States*, 2d Cir., 1947, 163 F. 2d 433, by Judge Clark in a concurring opinion at page 139.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. §22 have been distinguished in *United States v. Andolschek*, 2d Cir., 1944, 142 F. 2d 503.

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States v. Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 79) *United States v. Beekman*, 2d Cir., 1946, 155 F. 2d 580, 584, involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error.

In *United States v. Cotton Valley Operators Committee*, W. D. La., 1949, 9 F. R. D. 719, the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so

that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

In *Bank Line v. United States*, 2d Cir., 1947, 163 F. 2d 133, 138, Judge Augustus Hand said:

“It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual. . . .”

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951). He said:

“Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can.”—341 U. S., 172-173.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the courts and not the Department of Justice. In *Zimmerman v. Poindexter*, D. Hawaii, 1947, 74 F. Supp. 933, 935, the court said: “But the clear mandate that all executive regulations be ‘not inconsistent with law’ circumscribes the power of the entity pre-

scribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court."

This point is further supported by the holding in *Griffin v. United States*, D. C. Cir., 1950, 183 F. 2d 990, 993.

Attorney General Clark recognized that the question of privilege is one for the courts to decide rather than the Attorney General when he, in his Supplement Number 2, June 6, 1947, among other things, wrote:

"If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Later, however, the Attorney General instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the courts for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co. v. Masland*, 244 U. S. 100, 103 (1917) said:

"... if ... in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to de-

termine whether, to whom, and under what precautions the revelation should be made."

The same rule ought to apply in the determination of the privilege urged by the Government.

The courts that have given judicious consideration to the need for the production of the secret FBI investigative report for the purpose of determining whether or not there has been a full and fair summary made of the adverse evidence since the decision of the Court in the case of *United States v. Nugent*, 346 U. S. 1 (1953), have uniformly declared that it is necessary that the FBI report be produced at the trial. Motions to quash these subpoenas *duces tecum* by several judges have been denied.—See *United States v. Edmiston*, D. Neb., 1954, 118 F. Supp. 238, 240; *United States v. Evans*, D. Conn., 1953, 115 F. Supp. 340, 343; *United States v. Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States v. Stasevic*, S. D. N. Y., 1953, 117 F. Supp. 371; *United States v. Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States v. Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953; compare *White v. United States*, 9th Cir., Sept. 14, 1954, — F. 2d —, following the court below.

The court below talks about congressional intent and makes policy arguments which completely skirt around the real question. This calls to mind Mr. Justice Jackson's remarks in *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, 214 (1947): "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" After all the very extensive discussion by the court below it never gets around to answering the point: How can the court decide whether a full and fair summary of the evidence in the FBI report that is adverse was given to the registrant? It could not answer the question without confessing that it was necessary to see the FBI report. Consequently it avoids facing the issue by talking about everything else.

Let us consider the various so-called reasons given by the court below in its opinion for the refusal to produce the FBI report. It is petitioner's submission that the reasons of the court below are not cogent and find no basis in law. At 213 F. 2d, p. 908, the court below cites *United States v. Everngam*, D. W. Va., 1951, 102 F. Supp. 128; *Eagles v. Samuels*, 329 U. S. 304 (1946); *United States v. Balogh*, 2d Cir., 1946, 157 F. 2d 939; *Levy v. Cain*, 2d Cir., 1945, 149 F. 2d 338; and *DeGraw v. Toon*, 2d Cir., 1945, 151 F. 2d 778. It puts these aside as inapplicable. These are authority for the proposition that procedural due process of law must be complied with in draft board proceedings. They here support the proposition that if a hearing officer refuses to give a full and fair résumé there is a violation of procedural due process of law. They did not involve the FBI subpoena point. The doctrine of these cases supports the point here, that if there has been a violation of procedural due process of law claimed by the registrant the registrant ought to be entitled to prove it in court. And how can he prove it unless he gets the FBI report produced in court so the judge can see whether a full and fair résumé was made?

The court below then (213 F. 2d, p. 909) cites *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395; and *United States v. Evans*, D. Conn., 1953, 115 F. Supp. 340; as well as other cases by the district courts where the production of the FBI report has been sustained. The court overlooks the fact that Judge Wallace compelled the United States to produce the FBI report in the *Bouziden* case, *supra*, and in *United States v. Annett*, W. D. Okla., 1952, 108 F. Supp. 400, 404. In one broad sweep the court says that all the other federal judges have reached their conclusions "... without analysis or evaluation." (213 F. 2d, p. 909) Those cases, it is said, "... merely restate accepted principles of due process in selective service cases." Then the court says that the *Evans* case is "... predicated on error in at least two respects." According to the court below these are (1) that the Government has the burden to

prove validity of draft board proceedings and (2) that the *Nugent* case calls for a full and fair résumé.

The court below states (213 F. 2d, p. 909): "If the Government must point to . . . evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void." The court below then assumes a fact that is not so, when it says that the Government " . . . cannot use the F.B.I. file in a criminal trial." (213 F. 2d, p. 909) The answer is that the Government can use the FBI file in a criminal trial to prove that the hearing officer either did or did not give a full and fair summary of the unfavorable evidence. This is an erroneous statement in the opinion of the court below that has no support in law.—*United States v. Andolschek*, 2d Cir., 1944, 142 F. 2d 503, 506; *United States v. Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 78-79.

The court below says the *Nugent* opinion is not to be read " . . . as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process." (213 F. 2d, p. 909) This whole argument goes around in circles. It is an argument in a vacuum. It assumes a fact not true in every case and then by such assumption reaches a false premise. Yet all the time the court keeps admitting that if a registrant is not given an opportunity to answer evidence relied upon there has been a denial of due process. But the court goes on to say: "Applying these principles, we cannot hold that appellant was denied due process of law."—213 F. 2d, p. 909.

This whole argument defeats itself and cannot be understood. The basic error on which the court below reaches its wrong conclusion is: " . . . the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary." (213 F. 2d, p. 909) This is a very specious and

factitious argument. It ignores the due-process problem completely. It jumps away from the procedural due process problem and attempts to hide behind the conclusion reached by the court below, that there has been basis in fact for the denial of the conscientious objector status.

The defect in the above argument can be illustrated best by an analogy. Suppose a defendant is on trial for murder. The trial judge violates his procedural rights. The undisputed evidence shows the defendant is guilty. He appeals and claims in the appellate court there was a deprivation of due process of law on the trial. It could be argued in the appellate court (if the argument of the court below is right) that, because the defendant was admittedly guilty, he was not entitled to procedural due process of law on his trial. That is exactly what the Court of Appeals did in this case. It concluded that, because there was basis in fact for the denial of the conscientious objector status aside from the Department of Justice report and recommendation, the deprivation of procedural due process of law was harmless error.

If this new foreign principle of administrative law that has been grafted onto the law of this land by the court below is accepted, it means an end to reliance on violation of procedural due process of law as basis for destruction of administrative judgments. The opinion is riddled with error when it attempts to evade the necessity to produce the FBI report.

The court then assumes another fact that was never proved in this case. It assumes a factual conclusion that could never have been reached by the courts below without the production of the FBI report. After assuming this conclusion the court holds that it is unnecessary to produce the FBI report. The court says: "Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in *Nugent* to enable the Department 'to discharge its duty to forward sound advice to the appeal board.'"—213 F. 2d, p. 909.

The court below admits the contention of petitioner and then says: "... the test has still been met." (213 F. 2d, p. 910) It says two types of adverse evidence were in the FBI files. How did the court below know what was in the files without seeing them? The hearing officer in his report relied on two points: one the mistreatment of Simmons' wife, the other, his former drinking. There was nothing in the administrative record to show that such was all the unfavorable evidence. The Department of Justice relied on the entire file, including the secret FBI report. The Attorney General in his recommendation to the appeal board did not say that was all the unfavorable evidence, nor did the hearing officer so say.

The court below (213 F. 2d, p. 910) says that Simmons was questioned about his carousing. It then says: "By his own admission, he and his wife were asked questions relating to his abuse of her." This is not a correct statement. It is unsupported by the record. There is nothing in the record at the trial showing that Simmons beat his wife. Simmons testified: "Mr. West said that he had my file, and also the F.B.I. report concerning my case. He also said in the report it was reported that I was hanging around pool rooms. . . . He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine.' " [R. 19] Nowhere therein did the hearing officer call to Simmons' attention that he had unfavorable evidence of mistreatment of Simmons' wife.

Simmons testified: "I asked him what else was in the report. Mr. West started to tell me then about how long he had been in the law business with some large law firm here in Chicago, and that he knew all of the Justices in the Supreme Court." [R. 19] Now what sort of fair résumé was this?

The court below said that the question asked by West, the hearing officer, of the wife of Simmons about how he was treating her, without identifying any mistreatment, was "... sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency,

the appeal board." (213 F. 2d, p. 910) This indirect way of informing a registrant of unfavorable parts without informing him of all the adverse evidence is nothing more than a "cat and mouse" treatment of the registrant that was never contemplated by even the lowest grade of due process in administrative agencies.

The whole approach the court below takes to the problem ignores completely the basic proposition that the entire secret FBI report was before the Department of Justice. The recommendation of the Assistant Attorney General may well have been influenced by contents of the secret FBI report not referred to by the hearing officer. The court has no way of knowing what other adverse evidence there was in the report that led the Assistant Attorney General to make his unfavorable recommendation. There may have been other adverse evidence relied upon that was not specified by the hearing officer. This being true, how can it be said that the hearing officer complied with the regulation and gave all the unfavorable evidence? This is an unusually speculative way of deciding a law question.

The question that the court below had before it was whether the FBI report should have been produced at the trial for the purpose of determining *whether there was a fair and complete summary given*. The Court of Appeals reached the conclusion that there was a full and fair summary because the hearing officer did not refer to any other unfavorable evidence and the testimony showed that these two items were slightly touched upon. This is reaching a conclusion without the evidence, the FBI report. The court below reached a speculative conclusion that there was no unfavorable evidence in the file and thereby used that speculative conclusion as an excuse for failing to discharge the judicial function of compelling the production of the FBI report.

The court below says that in any event "... the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the

subpoena." (213 F. 2d, p. 910) This is an unreasonable way to approach a judicial problem. When the question of quashing the subpoena was before the court there was no evidence whatever before the judge as to what the contents of the draft board file were. No testimony had been taken. In other words, it required the district judge to anticipate what the testimony would be, which is impossible. The question was the error in quashing the subpoena *duces tecum* and refusing to produce the FBI report. The materiality of the FBI report must be conclusively presumed on the motion to quash, because how does the court know what the evidence is going to be? It means that the court must first try the case and then determine whether the subpoena is to be quashed. This is a most complex and scrambled way to deal with orderly judicial process. The court retried the case *de novo* and reached a finding that there was no basis in fact and there was a full and fair summary given and then determined the quashing of the subpoena was not error.

It is beyond the capacity of counsel to comprehend this type of judicial process. It is not in accordance with orderly judicial thinking. It is difficult to understand how the trial court can determine when it quashes the subpoena *duces tecum* what the evidence is going to be on the trial in response to the subpoena. This putting of the cart before the horse is a basic fallacy. It should be destroyed here.

The court below states (213 F. 2d, p. 910): "*United States v. Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which, as we have previously pointed out, those decisions rest." After reading all the court below has to say on the subject (213 F. 2d, p. 910) this Court will be unable to find one word in the opinion that even tends to approach a demonstra-

tion that there are " . . . basic fallacies in reasoning on which . . . those decisions rest."

The court below builds up a condition intolerable to the Government if the FBI reports are produced by compulsory subpoena. It beats the drums of fear and anxiety for the draft board officials. It says that the drafting of manpower will be begged down and completely stopped if the FBI reports are produced. The registrant is in court facing prison. He is not headed for the army. The drafting process is ended as far as he is concerned. Nothing could be farther from reality.

The Selective Service Regulations themselves require that all material and documents relied upon in the classification of a registrant must be included in the draft board file. (Section 1623.1) The court below says: "As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards." (213 F. 2d, p. 910) The plain answer to this great fear of making known the names and addresses of informants is that the court can compel the deletion of the names of informants before the FBI report is produced at the trial. This was done in *United States v. Stasevic*, S. D. N. Y., 1953, 117 F. Supp. 371.—See also *United States v. Evans*, D. Conn., 1953, 115 F. Supp. 340.

The court below says: "A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote. (213 F. 2d, p. 910) This is a far-fetched, unreasonable, unsupported statement. Just how will due process of law in the courts where it is necessary to have the FBI reports produced " . . . tie the hands of draft officialdom . . . "? The court below asks, in effect: 'Must we risk the raising of an army or must we risk judicial due process of law?' The issue is not so terrifying. No draft board

official has yet ordered the Attorney General not to produce the FBI report. It is the Attorney General who refuses to produce it. There is no draft regulation or order from the Selective Service System that prevents the FBI report from being produced. It is the Attorney General who has brought about this perplexing problem for the court below.

The Department of Justice by its misconduct in withholding the FBI report, aided by the district judge's quashing the subpoena calling for the FBI report, is the cause of the trouble and certainly it must be considered that to allow due process of law in a Selective Service case does not mean a breakdown of the armed forces of the United States.

The court below did not approach the problem with the same fearlessness that Judge Hand in the Second Circuit did in *United States v. Andolschek*, 2d Cir., 1944, 142 F. 2d 503, 506; and *United States v. Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 78-79. See *United States v. Reynolds*, 345 U. S. 1, 12 (1953). Those cases held that if the Government wanted to keep the FBI reports secret they should not prosecute when the reports become material, as here. And that seems to be a complete answer to the position taken by the Department of Justice in this case.

The Government may argue that it was unnecessary to have the FBI report produced at the trial because Simmons was familiar with the material in the FBI report. All Simmons knew about this was what he learned when he saw the recommendation of the Department of Justice. But this was not at the hearing or before it. It was at the trial, long after he had been denied his claims by the appeal board. This was entirely too late. He should have been given the summary by the hearing officer either at or before the hearing. That he may have gotten some of the information after he had been tried behind his back in the Department of Justice without any notice is no basis for saying that the FBI report should not be produced at the trial.—

Brewer v. United States, 4th Cir., 1954, 211 F. 2d 864; *Sheats v. United States*, 10th Cir., 1954, 215 F. 2d 746.

The FBI report is said to be immaterial to any issue. This is not so. The materiality is established by *United States v. Nugent*, 346 U. S. 1, 6 (1953); and *United States v. Evans*, D. Conn., 1953, 115 F. Supp. 340, 343. There was a duty on the trial court to determine whether what was said by the hearing officer to Simmons constituted a full and fair résumé of the unfavorable evidence. Even if the hearing officer mentioned nothing about adverse evidence or said there was none it still would be the duty of the trial court to see for itself whether there was a need to give a summary and to what extent the summary should be made. In *United States v. Packer*, 1952, 200 F. 2d 540, 542 (reversed on other grounds at 346 U. S. 1 (1953)) the Court of Appeals for the Second Circuit said: "It is true that in the case at bar the defendant was told that the F.B.I. report was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

The judicial function of the trial court cannot be determined until the FBI report is produced. It could not be produced, because the subpoena had been quashed. The trial court could not determine, and the Government is not entitled to argue here, that it was not material or admissible unless and until it saw the FBI report. Since the trial court took steps to prevent itself from being able to perform the judicial function by quashing the subpoena the case should be reversed.

How can it be said that the FBI report is not material when the trial court did not even make an inspection *in camera*? What authority does the Government have to assert to this Court that the FBI report is not material, when the document has been kept out of the record? How can this Court decide the question without seeing the FBI report?

Must this Court speculate in favor of the erroneous holding of the court below and the obdurate Government that hides the FBI report from this Court? Is this Court at the mercy of the Government? The mere asking of the questions reverberates the answer to all: No! Yet that is exactly the position the judicial process of the Court is placed in by the ruling of the court below and the position taken by the Government on this issue in this case.

The position taken by the petitioner on this point is sustained by *Gordon v. United States*, 344 U. S. 414, 418-420 (1953). In that case Mr. Justice Jackson stated:

"We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error."
—344 U. S. 414, 420.

While the trial court did not find the FBI report material and mark it for identification the order quashing the subpoena in effect amounted to a finding of materiality by the trial court. For the purpose of determining whether the FBI report was subject to subpoena it must be conclusively presumed that it was material. By quashing the subpoena the trial court made it possible for the FBI report to be produced for an inspection or examination *in camera* as to its materiality. This circumstance results in

a conclusive presumption on the record in this case that it was material. The trial court in quashing the subpoena made it impossible for it to go as far as it was required to go under *United States v. Schneiderman*, S. D. Cal., 1952, 106 F. Supp. 731.

The Government may take the position that it was necessary to call the witnesses subpoenaed and demand that the FBI report be produced. It was not necessary to do this. The witnesses were no longer under compulsion to produce the FBI report after the subpoena was quashed. The trial court had ruled the FBI report out. The trial counsel for petitioner was merely complying with the order of the court quashing the subpoena. Had the counsel for the petitioner demanded the FBI report or called the witnesses for this purpose, in the face of the ruling of that trial court previously made quashing the subpoena, it would have been treated perhaps as contempt or, at least, counsel would be subject to censure. Surely counsel is not required to go so far when a subpoena has been quashed. It has never been held that an assignment of error in quashing a subpoena is waived unless the witness is called and the evidence attempted to be obtained. The courts have not stretched the procedural requirements that far.

Any argument made by the Government that the point is not ripe for decision here because petitioner failed to call for the FBI report at the trial and make it part of the record on his appeal should be rejected. The Court can and should take judicial notice of the Order of the Attorney General that was in existence at the time of the trial of this case. It prohibited the United States Attorney from producing the report to the trial court even for inspection *in camera*. See Department of Justice Order No. 3229, revised by the Attorney General on January 13, 1953, revoking previous amendments of the order dated May 2, 1939, December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether the

privilege outweighed the materiality of the document. Since the United States Attorney was under legal compulsion not to produce it to the court for purposes of completing the record, how can it be said that petitioner failed to attempt to get it? Petitioner cannot be required to go through an idle and vain gesture.

Touhy v. Ragen, 340 U. S. 462 (1951), is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion, at p. 467.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2, pp. 463-464.) It is the validity of the order, as construed and applied to the particular facts, with which the Court is here concerned.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company v. Nashville Coal Company*, W. D. Ky., 1944, 55 F. Supp. 65.

The criminal cases relied upon by the petitioner in this cases (*United States v. Andolschek*, 2d Cir., 1944, 142 F. 2d 503, and *United States v. Beekman*, 2d Cir., 1946, 155 F. 2d 580) are, like the case at bar, distinguished for the reasons stated by the Court in *United States v. Reynolds*, 345 U. S. 1, 12 (1953). Please read the last paragraph of the majority opinion.

It is respectfully submitted that the district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. Petitioner was prevented from even offering the document into evidence at the trial. The document was relevant for the purpose of determining whether the hearing officer gave petitioner a full and fair summary of the unfavorable evidence appearing in the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling or the action of the court below

in affirming the order quashing the subpoena. The judgment of the court below should be reversed and the cause remanded to the district court for a new trial because of this error.

FOUR

In the event this Court concludes that the order sustaining the motion to quash in this case is proper and no error was committed, then petitioner requests this Court to reconsider and reverse its ruling in *United States v. Nugent*, 346 U. S. 1 (1953).

It is unthinkable that a person can be sent to prison after being tried behind his back in this country. Proceedings in star chamber were outlawed by the federal Constitution. If a registrant cannot see the FBI report and, when he becomes a defendant in criminal prosecution, cannot subpoena the report to determine whether the Department of Justice has done its duty to provide him a fair summary of the unfavorable evidence, then there has been manufactured for use in the federal courts of this country proceedings in star chamber. This deplorable condition is so serious and of such great magnitude that the entire problem should be reconsidered by this Court. See the joint petition for rehearing filed by respondents in *United States v. Nugent*, No. 540, October Term, 1952, and *United States v. Packer*, No. 573, October Term, 1952. Copy of the petition for rehearing (marked APPENDIX C) accompanies this brief. The petitioner herein does not request the Court to reconsider and overrule *United States v. Nugent*, 346 U. S. 1 (1953), in event this Court reverses the holding of the court below (that the subpoena *duces tecum* was properly quashed). Should the Court, however, hold that registrants are not entitled to use the FBI reports upon trials in the district courts where the defendants seek to show that there has been no full and fair summary of the unfavorable evidence, then petitioner requests the Court to reconsider and overrule its holding in *United States v. Nugent*, 346 U. S. 1 (1953).

CONCLUSION

This Court should hold (1) the appeal board denied petitioner his conscientious objector status without basis in fact and the classification is therefore arbitrary and capricious, (2) the hearing officer of the Department of Justice failed to make a full résumé and summary of the adverse information appearing in the secret FBI investigative report, (3) the failure to make this full and fair summary denied petitioner his rights guaranteed by the act and regulations, (4) the trial court committed reversible error when it ordered the subpoena *duces tecum* commanding the production of the secret FBI investigative report quashed. The judgment of the court below affirming the judgment of conviction should be reversed and the cause remanded to the district court with directions to grant the motion for judgment of acquittal. This Court should also, because of the importance of the question and even though the trial court is directed to acquit the petitioner, hold that error was committed in quashing the subpoena *duces tecum* commanding the production of the secret FBI investigative report. In event this Court does not order the district court to sustain the motion for judgment of acquittal, the petitioner says that the very least he is entitled to is a new trial in the district court because of the quashing of the subpoena *duces tecum*. In event the judgment of the court below is in all things affirmed, then this Court is requested to set aside the holding by it in *United States v. Nugent*, 346 U. S. 1 (1953).

Respectfully submitted,

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November, 1954.

APPENDIX A

September 3, 1953

MEMORANDUM FOR HEARING OFFICERS

Your attention is invited to the fact that paragraph five of Addendum No. 1 to the Instructions states that a résumé of the information developed by the inquiry is attached.

The résumé referred to therein will be prepared by this office and sent to Hearing Officers through United States Attorneys in *only* those cases in which investigations have been completed on or after August 17, 1953. Therefore, in those cases in which you *have not received* résumés of investigative reports, you are requested to send to registrants the old form of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" which provides that registrants upon request may be advised as to the general nature and character of any evidence in the Hearing Officer's possession which is "unfavorable to, and tends to defeat, the claim of the registrant. . . ."

The new "Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" enclosed herewith should be sent only to those registrants for whose cases résumés have been received by Hearing Officers from the department.

Except as provided above, Memorandum No. 41, together with attachments supersedes all previous instructions issued by the Department with respect to conscientious objector matters.

/s/ T. Oscar Smith

T. Oscar Smith
Special Assistant to the
Attorney General

APPENDIX B

(New Instructions Since July, 1953)

ADDENDUM NO. 1 TO INSTRUCTIONS TO HEARING OFFICERS APPOINTED PURSUANT TO THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (P.L. 51, 82nd Cong., 1st Session; 50 USC App. 466(j), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious objector claim. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious objector classification he claims. The registrant has a right to appear at the hearing

and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Legal rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any argument concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

....., Hearing Officer

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JAN 31 1955

HAROLD S. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

This reply to the brief for the United States will consider the points made in that brief that need replying to in the order in which they appear in that brief.

I.

The respondent (page 2 of its brief) unduly restricts the questions presented. This is done by omitting whether the recommendation of the Department of Justice to the

appeal board was illegal to such an extent as to destroy the appeal board classification.

Question number 3, appearing on page 2, stated by respondent contains an erroneous statement about the showing made in the record. To the contrary, the appeal board did rely on the recommendation of the Department of Justice. The recommendation was based on adverse evidence that had not been disclosed to petitioner.—See pages 12-13 of the brief for petitioner.

II.

It is implied erroneously by respondent (page 3 of its brief) that petitioner was employed by the Great Lakes Naval Training Center. To be more precise, petitioner was employed by the United States Civil Service Commission as a chauffeur. There is no evidence or suggestion anywhere in the record that petitioner performed any duties directly connected with the war effort. [R. 43, 48] It is to be noticed that the Department of Justice in its recommendation to the appeal board did not state that petitioner was employed by the navy. It merely stated: "At the present time he is employed as a chauffeur." [R. 53]

III.

It is stated that on October 30, 1951, petitioner filed his special form for conscientious objector. (See page 4 of respondent's brief.) Petitioner started attending meetings of Jehovah's Witnesses in November, 1949. [R. 49] This was at a time when there was no drafting of registrants. The draft was in the "deep freeze."—In re *Fabiani*, E. D. Pa., 1952, 105 F. Supp. 139.

IV.

Reference is made to the testimony of petitioner at the trial. (See footnote 5 on page 5 of the respondent's brief.) The inference from this footnote is that petitioner was claiming to be a minister only and not a conscientious objector. It

is stated that he admitted that he did not discuss his conscientious objector claim with the local board.

It is true that he stated that he talked about his ministerial claim and not about the conscientious objector claim. [R. 31] Nevertheless, it was the responsibility of the local board to consider both classifications. Failure to discuss the conscientious objector claim did not constitute a waiver of it. The duty of the local board to consider all claims for classification is considered in *United States v. Fair*, M. D. Pa., 1954, 122 F. Supp. 666:

“The undisputed evidence in this case clearly indicates that the defendant is a bona fide member of the sect known as ‘Jehovah’s Witnesses’ and because of his belief in the teachings of that sect is conscientiously opposed to military service. The printed portion of the questionnaire under the caption ‘REGISTRANT’S STATEMENT REGARDING CLASSIFICATION’ reads in part as follows:

‘INSTRUCTIONS: It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. *The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.*’ (Emphasis supplied.)”

The petitioner, however, it should be observed, placed a booklet “with each member of the board entitled ‘God and the State.’” [R. 30] This booklet pertained to both the ministerial and the conscientious objector status. It is plain, therefore, that while he spoke about his ministerial status he also, by submitting the booklet to the board, presented his conscientious objector claim for consideration. [R. 30] He told the board that he wanted to be classified first as a min-

ister but that he was a conscientious objector. He added that in his case it was necessary, in order for him to be a minister, to be a conscientious objector to war. [R. 29]

The relevance of the testimony given by petitioner at the trial is confined to what took place at the hearing. No *de novo* evidence about his status can be considered for the purpose of determining whether there was basis in fact. —*Cox v. United States*, 332 U. S. 442 (1947); *Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93.

Since there is no contention that the local board deprived petitioner of procedural due process of law the Court is not here concerned with any action taken by the local board. There is involved here only the appeal board classification, the local board classification having been superseded by the final appeal board classification. Where there has been an appeal taken from the local board classification, the courts are concerned only with whether the local board has deprived the registrant of procedural due process of law. —*United States v. Zieber*, 3rd Cir., 1947, 161 F. 2d 90; *United States v. Stiles*, 3rd Cir., 1948, 169 F. 2d 455.

V.

On page 6 of its brief the respondent makes a point about the request for personal appearance's saying nothing about the conscientious objector claim. There is nothing in the law that required petitioner to specify his claims in requesting personal appearance. Failure to mention the conscientious objector claim is of no significance. All that the law requires is that he file "a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him."—32 C. F. R. § 1624.1(a).

The memorandum made by the local board states that petitioner was seeking classification as a minister and not as a conscientious objector. [R. 68-69] The fact that a registrant is insisting on a lower classification and mentions he does not want the higher classification does not constitute a waiver of his right to the other classification not urged.

(See 32 C. F. R. §§ 1622.1(e), 1622.2.) It was unnecessary for petitioner to mention the conscientious objector claim either orally at the hearing or by letter requesting the personal appearance, since the papers showing his conscientious objections were on file with the board and it was unnecessary for him to repeat the claim.

VI.

In footnote 6, page 6 of the respondent's brief, it is stated that the letter filed with the local board on or after personal appearance related to his ministerial claim. A reading of the letter shows that it related also to his "neutrality" which is known by all to be the basis for the conscientious objections of Jehovah's Witnesses. [R. 67] The letter related to the conscientious objector claim as well as the ministerial claim.

VII.

Emphasis is placed (page 7 of respondent's brief) on the fact that petitioner's appeal letter of December 18, 1951, did not mention his conscientious objector status but mentioned only that he was a "regular minister of religion." It is immaterial and irrelevant. It is not necessary for petitioner to claim conscientious objector status in his appeal. The appeal itself places the entire case *de novo* before the appeal board.—*Cox v. Wedemeyer*, 9th Cir., 1951, 192 F. 2d 920; *Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93.

VIII.

The statement is made (pages 7 and 8, footnote 7, respondent's brief) that petitioner did not request unfavorable information appearing in the FBI report "prior to the hearing." Reference is made in that footnote to the procedure in effect at the time of the hearing. While the written instructions stated that the registrant would be supplied with unfavorable evidence on request prior to the hearing,

the hearing officer did not insist on this advance request. He undertook to refer to the FBI report on his own motion at the hearing. The hearing officer opened the hearing with the statement that he had the draft board file and "also the FBI report" concerning petitioner's case. [R. 19] He stated to Simmons that the FBI report indicated he had been "hanging around pool rooms" and inquired as to whether he was doing that "now." Simmons said he was not. Simmons "asked him what else was in the report." The hearing officer refused to answer this or eluded him. [R. 19]

This action on the hearing officer's part, in voluntarily and on his own motion going into the FBI report, constituted a waiver of any duty of Simmons to insist on his request about the furnishing of the unfavorable evidence appearing in the FBI report prior to the hearing. The hearing officer waived the requirement of prior written request by voluntarily going into the matter himself. It is out of place and of no consequence for the respondent to suggest here that petitioner is in no position to complain of the action of the hearing officer. Had there been a total failure to go into the FBI report, then the position of the respondent might be good, but since the hearing officer went into the FBI report at the hearing it is of no consequence whatever that petitioner did not request in writing in advance of the hearing the adverse information. The hearing officer did not insist that petitioner waived his right. The hearing officer did not claim a waiver. It is too late for the respondent at this stage of the proceedings to mention this point. This point urged here was not relied on by the court below.

IX.

The statement is made on page 8 by the respondent that the hearing officer noted that "there was some evidence of present sincerity." (See also respondent's brief at page 35.) The recommendation of the Department of Justice informs the appeal board that the "Hearing Officer reports regis-

trant impressed him as sincere." [R. 54] Even the recommendation of the Department of Justice recognized that petitioner was sincere, stating: "In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence towards his wife." [R. 54] Even the secret informants believed petitioner to be sincere. [R. 54] The recommendation of the Department of Justice fails to state explicitly that petitioner is not sincere. [R. 54-55]

X.

The respondent fails to show the Court that petitioner's police record and convictions antedated his conversion and baptism as one of Jehovah's Witnesses in October, 1951. [R. 54] It is true that he had been in training a little less than two years before this date, but the proof shows that he had changed. [R. 53-54] The visit by the police on January 6, 1952, according to the secret FBI report (referred to on page 9 of respondent's brief), was not an arrest. In any event, these family disorders do not prove that petitioner is not a conscientious objector, inasmuch as there is no challenge to his sincerity.

XI.

Petitioner does not state that this Court should disregard the surrounding circumstances, as suggested by respondent on page 17 of its brief. Petitioner admits that if there are any relevant facts appearing in the file that contradict and impeach the claim, these facts can be considered. Petitioner does state that irrelevant and immaterial facts and speculations advanced by respondent do not constitute basis in fact. There is no disagreement between respondent and petitioner as to the rule of law to be applied. It is the enforcement of the rule where the parties divide.

XII.

It is stated by respondent (pages 11 and 18 of its brief) that petitioner did not claim he was a conscientious objector at the time he registered. It is true that he did not show that he was a conscientious objector at that time, but 32 C. F. R. §§ 1625.1 and 1625.2 authorize petitioner to make a showing that he was a conscientious objector after his registration.—*United States v. Vincelli*, 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216 F. 2d 681; *Hull v. Stalter*, 7th Cir., 1945, 151 F. 2d 633.

XIII.

The fact that petitioner's claim for classification as a conscientious objector occurred in October, 1951, does not *per se* prove him to be in bad faith. (See respondent's brief, page 18.) It is true that hostilities had begun before that date. However, long before hostilities had begun petitioner had become a conscientious objector. There was no occasion for him to make his objections known until his deferred marital classification was taken away from him in October, 1951. (*United States v. Vincelli*, 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216 F. 2d 681) In October, 1951, it then became necessary for petitioner to make his new status known. This was time enough.—*United States v. Vincelli*, *supra*; *Hull v. Stalter*, 7th Cir., 1945, 151 F. 2d 633.

XIV.

It is asserted on page 18 of respondent's brief that the answer of petitioner to question 3 was vague. There is nothing vague about his answer. Neither the Department of Justice nor the local board challenged the answer or called for a bill of particulars. It is said that his answer to question 6 of Series II [R. 47-48] is proof that he was seeking only a ministerial classification. This is erroneous. While he was seeking a ministerial classification, he did not abandon his conscientious objector claim. The best

proof that one of Jehovah's Witnesses is sincere is that he be a minister in the group. Jehovah's Witnesses are an organization of ministers and missionaries, so participation in the preaching activity is a conspicuous demonstration of the test of his convictions. It proves his sincerity. The religious preaching activity was proof of his conscientious objections.

The objection of the respondent is a quibbling over words. What is said about the answer to question 6 applies with equal force to question 7. (See the answer, on page 48 of the record.) There is nothing wrong about his answer here. The only opportunity he had to give public expression to the views was in his preaching activity from house to house and on the streets. This is not unusual. It does not prove that he was abandoning his conscientious objector claim. (See Local Board Memorandum No. 41, issued by National Headquarters of Selective Service System, November 30, 1951, as amended August 15, 1952.) This memorandum proves that there cannot be a waiver of the conscientious objector status in the absence of an express written waiver. Circumstances and arguments of this kind made by respondent constitute no basis for a denial of the conscientious objector status.

XV.

The suggestion is made by respondent several times that petitioner is not entitled to be classified as a conscientious objector because he was employed at the United States Naval Base. (See respondent's brief, pages 12, 18, 22.) It should be remembered that there is no evidence that petitioner was directly participating in the war effort. The record shows he was merely a chauffeur for the United States Civil Service Commission at the Great Lakes Naval Training Center. [R. 43, 53] His presence at the base did not make him a direct participant. Suppose he had been working at a drugstore, a café or a grocery store at the

naval base. This certainly would not be direct participation in naval service.

The argument of respondent on this point is presented here for the first time in these proceedings. The local board, the appeal board, the district court and the court of appeals did not consider this suggestion urged here for the first time as basis in fact. The Department of Justice in its recommendation did not rely upon it. Respondent's position in raising the point at this late date is inconsistent with the stand the Department of Justice took before the appeal board.

In any event, this is not a relevant basis for the denial of conscientious objector status.—See the arguments appearing in the brief for petitioner in *Gonzales v. United States*, No. 69, October Term, 1954, and *Witmer v. United States*, No. 164, October Term, 1954.

XVI.

On page 22, footnote 10, respondent cites the case of *White v. United States*, 9th Cir., 1954, 215 F. 2d 782, 785-786. This case relates to the I-A-O classification. The United States Court of Appeals for the Ninth Circuit has made a distinction between classifications I-A and I-A-O, for the purpose of relevance of doing war work. That court has held that if the classification is I-A-O the performance of war work is relevant and material as a basis for the denial of the conscientious objector status. However, that court has held that where the classification is I-A the performance of war work is not material. (See *Franks v. United States*, 9th Cir., 1954, 216 F. 2d 666; *Goetz v. United States*, 9th Cir., 1954, 216 F. 2d 270; *Clark v. United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —.) The United States Court of Appeals for the Seventh Circuit has held that the performance of defense work is irrelevant for the purpose of denial of conscientious objector status.—*United States v. Wilson*, 7th Cir., 1954, 215 F. 2d 443.

XVII.

It is argued (page 9 of its brief) by respondent that upon personal appearance petitioner was seeking classification only as a minister of religion and not as a conscientious objector. The fact that he was seeking the ministerial classification does not spell abandonment of the conscientious objector status.—See the argument given, *supra*, under point IV.

There cannot be a waiver of the conscientious objector status because of petitioner's claiming the ministerial classification. (See *Cox v. Wedemeyer*, 9th Cir., 1951, 192 F. 2d 920; *Pine v. United States*, 4th Cir., 1954, 212 F. 2d 93.) These cases also reject the argument made by respondent (at the top of page 20 of its brief) that the appeal was limited to the ministerial claim. This contention is contrary to law. 32 C. F. R. § 1626.26 prescribes that the procedure by the appeal board shall be *de novo*.

XVIII.

It is admitted by respondent (page 20 of its brief) that upon appeal the case was referred to the Department of Justice. The very fact that this was done shows that the appeal board did not consider that petitioner had waived his conscientious objector claim. It shows that the appeal board considered that the conscientious objector claim was involved on the appeal as though petitioner had filed the claim timely.

XIX.

The point is made (page 22 of its brief) by respondent that because petitioner made his claim after he was taken out of Class III-A and again classified I-A, the claim was made so late as to prove insincerity. Under 32 C. F. R. §§ 1625.1 and 1625.2 petitioner had the right to make the claim at a late date. (*United States v. Vincelli*, 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216

F. 2d 681; *Hull v. Stalter*, 7th Cir., 1945, 151 F. 2d 633) Since the law authorizes the making of the late claim, how is it that the respondent thinks it can rely on what the law allows, as a basis for the denial of the conscientious objector status? This is taking that which is lawful and using the procedure provided by the regulations as a basis in fact for denying the claim for classification.

XX.

The reliance by respondent (page 22 of its brief) upon the so-called violent and abusive behavior of petitioner toward his wife is wholly irrelevant and immaterial. It is based on the most unreliable evidence. The FBI report referred to a police court record. The report did not give the particulars. The mere conviction of a crime of assault and assessment of a fine for the offense does not *per se* prove that petitioner is insincere and not a conscientious objector. Even a conscientious objector can have trouble with his wife. It is no reason for penalizing a conscientious objector for this misfortune that befalls men of other classes. The FBI report was hearsay. It is doubly unjust to rely upon this evidence, because it was not drawn to petitioner's attention, and neither he nor his wife had the opportunity to defend, before the administrative agency, the use of this evidence.

XXI.

The respondent (page 24 of its brief) states that "lateness of religious conversion or of a crystallization of religious scruples against participation in war" does not preclude a sincere conscientious objector from obtaining exemption. This concession is made ridiculous by what thereafter follows. Respondent says if the conversion takes place after one becomes liable for military service or during the time one is within the draft age, such conversion would be a circumstance to prove insincerity. It is preposterous for the respondent to make such a concession in one breath and take it away in the next with the impossible condition

imposed. From the absurd argument it can be taken that a newly converted conscientious objector cannot be sincere unless he is outside the age bracket for military service in time of war or unless he is converted during peace time, when there is no draft law in effect.

With the future of this country confronted not with peace but with war, in time there would be no conscientious objectors recognized in this country. All would be in prison under this theory of interpretation of the statute, unless they were born and reared as conscientious objectors. But even Jehovah's Witnesses born and reared as conscientious objectors, according to the respondent, are not entitled to exemption under the conscientious objector provision because of their belief in theocratic warfare and self-defense. The petitioner would be in no better standing, under the law according to respondent, had he been born and reared as one of Jehovah's Witnesses. This argument is answered in the reply brief for petitioner in *Sicurella v. United States*, No. 250, October Term, 1954.

XXII.

Respondent states on pages 28, 30-31 of its brief that petitioner was properly denied the conscientious objector status because he relied "solely upon his own statements." The local board did not question the veracity of petitioner. The truthfulness of his statements was not challenged by the hearing officer or the Department of Justice in its recommendation.

All statements of fact made by petitioner in his conscientious objector form and in his statements are subject to perjury prosecutions. They are the equivalent of sworn testimony under the act and regulations. It cannot be asserted that his claim is a mere allegation. It is based on sworn testimony.

It is true that his statements were not corroborated by others of Jehovah's Witnesses through the filing of affidavits. But his claim is corroborated by others of Jehovah's Witnesses through the FBI report. In the recommendation

by the Department of Justice it is brought out that all of petitioner's references, four in number, corroborated his claim for classification as a conscientious objector. The recommendation states: "References, all of whom are members of the same sect, believe registrant is sincere, as do his neighbors." [R. 53]—See the names of references. [R. 50]

Since the Department of Justice procedure is for the benefit of the claimant (*White v. United States*, 9th Cir., 1954, 215 F. 2d 782; *Tomlinson v. United States*, 9th Cir., 1954, 216 2d 12), it must be assumed that petitioner corroborated his statements by the testimony of the references given to the Department of Justice. It cannot be argued that he failed to corroborate his claim. It was not necessary that he file sworn affidavits, especially since the FBI report verified his sincerity through the informants, who were Jehovah's Witnesses and his neighbors. Petitioner did, therefore, reinforce "his personal statements with additional evidence sufficient to preclude rational men from attaching significance to circumstances which would otherwise provoke doubts."—Respondent's brief, page 28.

XXIII.

Respondent makes a sharp contrast between conscientious objector cases and minister of religion cases at pages 28-29 of its brief. It states that what the registrant does is important only in relation to his "mental state." The religious beliefs of petitioner are objective and easily established. They are undeniably opposed to participation in combatant and noncombatant military service. The belief of petitioner in the Supreme Being is undisputed and certainly objective. No one would deny his belief in the Supreme Being. The undisputed evidence shows he objects to military service. This certainly must be considered. It also is established without doubt that his belief is based on religious training and belief.

Whether he is sincere does not involve an impossible mental examination or a searching of his heart. His insin-

cerity can be established by determining if he is a hypocrite, such as determining that he lives a life inconsistent with the standards of Jehovah's Witnesses. It could be shown he is a hypocrite by showing that he does not carry out his preaching obligations as one of Jehovah's Witnesses, or that he does not attend the religious meetings of Jehovah's Witnesses, or does not practice what he preaches. But none of such circumstances or evidence of hypocrisy and insincerity is present here.

The respondent takes many innocent circumstances and cements them together and then attempts to make them stand up as evidence of insincerity. Such elements that have been put together will not adhere and hold, because they are not material factors bearing on the "good faith of the objections of the person concerned."—Respondent's brief, page 29.

What Congress was after in reference of the case to the Department of Justice were not opinions and speculations, but facts. See what Senator Gurney said in making known his objections to the creation of a separate conscientious objector agency, when hearings were had on Senate Bill 2655: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

Actually, what Congress was after by reference of the case to the Department of Justice were facts and circumstances that were inconsistent with the religious beliefs of the organization to which the conscientious objector belonged. The respondent here has never attempted to turn up any fact showing that petitioner has done that which is inconsistent with his religious beliefs. The facts turned up are facts inconsistent with what the respondent says is a true conscientious objector. This attempt of respondent to constitute itself a hierarchy of conscientious objectors under the law is contrary to the intent of Congress. It permits the respondent to discriminate, contrary to equal justice under law.

XXIV.

Contrary to what respondent says (page 30 of its brief), before "his demeanor" and "circumstances surrounding the assertion of his claim" can take on any significance against a conscientious objector, it must be shown that the "demeanor" and "circumstances" are relevant. Insofar as "demeanor" is concerned, there is no documentary memorandum in the file showing that petitioner's demeanor gave rise to a belief that he was insincere. Neither the memorandum of the local board nor the report of the hearing officer indicated a bad demeanor. The absence of this record gives rise to the presumption that there was no bad demeanor.—*Williams v. United States*, 5th Cir., 1954, 216 F. 2d 350.

Suppose the government did not like the way a registrant parted his hair or that the hearing officer believed the registrant claiming to be a conscientious objector did not show proper meekness; such would not be any "circumstances surrounding the assertion of his claim" that would take away his rights to the deferment.—*Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689.

XXV.

The Court ought not to overlook the argument raised by petitioner under point one of his brief that the recommendation of the Department of Justice, based on the late association of petitioner with Jehovah's Witnesses as a conscientious objector, is an illegal recommendation that destroyed the proceedings. An illegal recommendation followed by the appeal board destroyed the final classification.—*Annett v. United States*, 10th Cir., 1953, 205 F. 689; *Taffs v. United States*, 8th Cir., 1953, 208 F.2d 329; *Clementino v. United States*, 9th Cir., 1954, 216 F. 2d 10; *Goetz v. United States*, 9th Cir., 1954, 216 F. 2d 270; *Clark v. United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Shepherd v. United States*, 9th Cir., No. 14,105, Dec. 13, 1954, — F. 2d —.

See the main brief for petitioner in the companion case

of *Gonzales v. United States*, No. 69, October Term, 1954, at pages 49-51.

XXVI.

At pages 14, 31-34 of its brief respondent contends that petitioner failed to demand the unfavorable evidence in writing before the date set for the hearing before the hearing officer.

Heretofore it has been pointed out, under point VIII, *supra*, that while the petitioner did not request the evidence in writing he did orally request it. It is further shown that the hearing officer waived entirely the failure of petitioner to request in writing the unfavorable evidence prior to the hearing. The hearing officer himself called some of the adverse evidence to the petitioner's attention. Then petitioner requested all the evidence, which was not given to him.

XXVII.

An oral request for the unfavorable information, made at the hearing, is sufficient. Registrants are not to be dealt with as though they were litigants represented by counsel. (*Berman v. Craig*, 3rd Cir., 1953, 207 F. 2d 888, 891) This is especially true now that the Department of Justice, since 1953, follows the practice of giving a summary or résumé even when not requested.

The burden falls upon the Department of Justice to show that it is harmed by an oral request made at the hearing. Unless the hearing officer says that he is unprepared because of lateness it is not in order to speculate that the oral request was inadequate.

XXVIII.

Respondent (page 34 of its brief) criticizes the statement that a proper interpretation of the law requires notice of the adverse evidence whether requested or not. The practice of the Department of Justice since September,

1953, supports the interpretation put upon the law by petitioner and answers the criticism appearing at the top of page 34 of respondent's brief. If there were no basis for petitioner's statement that the change took place as a result of *United States v. Nugent*, 346 U. S. 1, then why did the Department make the change immediately after the *Nugent* decision? Then for the first time it started giving registrants a summary of the FBI report whether or not it was requested before the date set for the hearing.

XXIX.

Petitioner challenges the limitation of the right to be provided with adverse information. Respondent limits the right to only such adverse evidence that will thereafter be relied upon in the Department's recommendation. (See its brief, pages 34-35.) At the time of the hearing, how can petitioner know what the Department will thereafter rely upon? It is the duty of the Department to provide petitioner with a fair summary of all the unfavorable evidence in the FBI report. This right does not hinge on what may thereafter be recommended to the appeal board by the Department. A rule that would confine the providing of information only to that which appears in the recommendation to the appeal board puts the cart before the horse and places the entire matter solely in the unreachable discretion of the Department of Justice. Congress did not intend thus, because, as has been shown heretofore, Congress said that it was after the facts. How can the facts be obtained if the Department of Justice shall say what part of the facts it shall divulge?—See, *supra*, under point XXIII, what Senator Gurney said, at 94 Cong. Rec. 7305.

XXX.

At page 35 of respondent's brief the argument is made that the appeal board has no knowledge of the unfavorable contents of the FBI report. While this may be true, the harm of not revealing all the unfavorable evidence to the

petitioner is not cured by concealing it from the appeal board.

It should be remembered that the Department of Justice makes its recommendation upon the entire FBI report. It is not necessary for the Department to summarize in its recommendation all the unfavorable evidence. There may be and often is a great deal of unfavorable evidence that would lead the Department to its adverse recommendation that may never be mentioned. To argue that notice of the adverse evidence is confined only to what appears in the recommendation is to ignore reality and greatly to curtail and limit petitioner's right. He cannot be given a summary of only what might thereafter be referred to by the Department of Justice. How can the hearing officer or the petitioner at the hearing know what may thereafter be relied on by the Department of Justice in its recommendation to the appeal board?

XXXI.

It is said by respondent on page 36 of its brief that petitioner was told of the adverse evidence about his drinking and gambling, and respondent refers the Court to petitioner's brief at page 40 and to the record at page 19 for corroboration. This does not appear from the record or from petitioner's brief to be true. All that was stated by the hearing officer was that petitioner had been hanging around pool rooms. [R. 19] This certainly is not equivalent to saying that he had been drinking and gambling. Petitioner was not informed of the adverse evidence about drinking and gambling. [R. 10] The information by the informant, according to the Department's recommendation, was that petitioner was "a rather heavy drinker and crap shooter," but there is nothing in the record to show that that information was called to the attention of petitioner, as claimed by the respondent on page 76 of its brief. It is error for respondent to say that petitioner admitted at the trial and in his brief that he was notified about all this adverse evidence. The

statement appearing on page 36 of respondent's brief to this effect is challenged.

XXXII.

Respondent admits (pages 36-37 of its brief) that the reference to the police record was expressly relied upon in its recommendation to the appeal board. This admission, coupled with the undisputed evidence that this was not called to petitioner's attention, brings this matter squarely within *United States v. Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398, 399.

The respondent (page 37) attempts to minimize the damage done to petitioner at the hearing before the hearing officer. Respondent omits to call to the Court's attention what occurred after petitioner's wife was asked how Simmons was treating her, and she said "Fine." The hearing officer thereupon threw petitioner off his guard and misled him into believing that there was no need for further pursuing the request for unfavorable evidence. The hearing officer said he was "going to recommend me for ministerial status to Washington." [R. 19] This was highly misleading, for the hearing officer knew that petitioner had just asked him "what else was in the report." [R. 19] Yet the hearing officer evaded Simmons on the request and then misled him, following the question to his wife as to how he had been treating her. [R. 19] It is evident, therefore, that never at any time did petitioner get notice of any of the unfavorable evidence in the FBI report about the trouble with his wife and the police record based thereon. However, it is wrongly implied to the contrary in respondent's brief that he did receive such notice.

XXXIII.

It is argued (page 37 of respondent's brief) that petitioner did not contend that he did not understand the question relating to his past treatment of his wife. There is nothing on the face of the question that it related to past

treatment. Petitioner does contend that he did not understand this question. Had he understood it and been called upon to answer, he and wife would have undoubtedly been able to explain the matter. It should be remembered that the petitioner was misled by the hearing officer immediately after his wife said "Fine," into believing that "he was going to recommend me for ministerial status to Washington." [R. 19]

XXXIV.

It is said (pages 37-38 of respondent's brief) that petitioner did not offer to show that he was prejudiced by the refusal of the hearing officer to make a full and fair summary of the FBI report. As to that part appearing in the recommendation of the Department of Justice, it was unnecessary for him to state that he was prepared to impeach or contradict the information. It is to be presumed that he would be able to explain it had he been apprised of it. It involved speculation of the wildest sort to conclude that petitioner was not harmed. Prejudicial error was committed by the Department of Justice. The burden fell on the government, when it failed to make a full and fair summary, to prove that the petitioner did not act in self-defense or was not provoked. (See respondent's brief, page 38.) As to the undisclosed unfavorable evidence appearing in the FBI report, it is impossible to know what petitioner could have said.

XXXV.

Respondent relies on *Market Street Railway Co. v. Railroad Comm. of California*, 324 U. S. 548, 560-561, (1945). The case here is identical to *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio*, 301 U. S. 292 (1937), cited in the *Market Street Railway* case, at pages 559-560. The Court said: "Nothing of that kind occurred in this case." (324 U. S., at page 560) But it should be remembered that in this case something of that kind did occur. Consequently

Market Street Railway Co. v. Railroad Comm. of California, supra, is not applicable.

Concerning the use of reports of the Market Street Railway Company by the commission, discussed by the Court at pages 561-562, this holding, also, is not applicable. In that case the commission actually used the records of the company, which were, of course, outside the administrative record. It was merely a part of a great heap of testimony relating to the general subject.

That case did not involve a situation such as the one we have here. There was no general inquiry into the subject at all. There was an inquiry into the revenue, and the commission went outside the record and got one little piece of evidence to add to the great abundance of evidence already in the record on the subject. Here the entire general subject of petitioner's mistreatment of his wife and the criminal record based thereon was not even referred to. In such a situation it is not necessary for the registrant at his trial to prove what he would have said had this been drawn to his attention. The burden was on the government to prove that he was not prejudiced.—*Kotteakos v. United States*, 328 U. S. 750, 760-761.

In the *Market Street Railway Co.* case the objections to the procedure employed had "no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions." (324 U. S., at page 562) Here the subject matter was not a continuous one, but was one isolated event in a man's life that had never been called to his attention. The reference to this was not "an incidental reference as we have here to a party's own reports," but the reference was direct and not incidental. It was itself an entirely new matter of which petitioner had no notice whatever. The petitioner was, therefore, harmed and the "prejudice constitutes a want of due process."—See 324 U. S., at page 562.

The contention that it is necessary to show in the record in what manner the petitioner would contradict or explain

the illegal evidence heard or received in star-chamber proceedings by use of the secret FBI report is invalid and inapposite. Let an analogy suffice to prove that petitioner has not waived his point. Suppose that a trial judge in a criminal case tried without a jury, as this case was, receives evidence secretly from one of the parties in his chambers. Certainly an appellate court, as a condition precedent to reversal, would not require the defendant to show that he was prepared to prove the falsity of the evidence before a reversal would result. Such is the situation here. It is the use of the adverse evidence without giving a summary which *ab initio* the use makes the proceedings void. Whether the evidence was truthful or not is immaterial. The use of such evidence without notice is a violation of procedural due process of law.

XXXVI.

At the bottom of page 40 and the top of page 41 of respondent's brief it says that had the production of the FBI report been compelled at the trial it would mean an inquiry "into the mental processes underlying the Department's recommendation." This is a most farfetched statement. On page 32 of its brief respondent has admitted that *United States v. Nugent*, 346 U. S. 1, 6, required that petitioner be supplied with a fair résumé of the unfavorable evidence. It was a question of judicial inquiry, not into the mental processes of the officers in the Department of Justice, but whether those officers had given a full and fair summary of the unfavorable evidence. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? Would a subpoena requiring the compulsory production of the book mean going into the mental processes underlying the author's work? Certainly not. The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a

fair summary of the adverse evidence was given until the FBI report, which was summarized, is produced for comparison.

This certainly answers the argument (page 41 of respondent's brief) that it is anomalous to hold that a registrant is not entitled to see the report at the hearing but can see it at the criminal trial. It would not only be anomalous but ridiculous to hold that if a registrant was entitled to have a full and fair summary at the hearing he could not have the summarized document at the trial to determine whether or not it had been fairly summarized.

XXXVII.

As for what is said in footnote 17, on pages 41-42 of respondent's brief, about the subpoenaing of the FBI report in *United States v. Packer*, 346 U. S. 1, and the denial of the petition for rehearing, 346 U. S. 853, it can be said that this Court was not concerning itself with that issue because that was not the question that had been presented to the Court in the petition for writ of certiorari. It was not the question that had been ruled upon by the Court of Appeals. Consequently it was not before the Court. If it be held that the question was before the Court, then petitioner here and now challenges the holding of this Court in the case of *United States v. Packer*, and asks the Court to overrule that holding and hold that it is erroneous for the reasons set forth here and in the main brief in this case.

It is plain that petitioner was entitled to have the FBI report produced at the trial, since a summary of it had been given to him at the hearing by the hearing officer. Moreover, the record in the *Packer* case shows there was nothing unfavorable in the FBI report. Here the recommendation of the Department of Justice does refer to unfavorable evidence. In this respect the two cases are dissimilar.

XXXVIII.

At the bottom of page 44 and the top of page 45 of respondent's brief, the argument is made that this Court cannot assume that there was other unfavorable evidence in the file. This argument ignores reality. There is no procedure in the Department of Justice that regulates the recommendations of the Department of Justice to the appeal board to command a summary of all the unfavorable evidence. There is nothing in fact to request the Department to refer to any unfavorable evidence. It can merely recommend that the conscientious objector claim be denied. It should be remembered that the concluding paragraph of every adverse recommendation of the Department of Justice reads: "After consideration of the entire file and *record*, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained." (Emphasis supplied.) [R. 54-55]

It is to be seen from this quotation that the recommendation is based on the "record." The "record" here refers to the record of the Department of Justice. This "record" is to be distinguished from the "entire file," which refers to the draft board file. Since there is no appraisal of the "record" and no itemization of the adverse evidence appearing in the "record" of the Department of Justice, including the secret FBI report, it requires the wildest sort of speculation to say that the recommendation of the Department of Justice is not based on some undisclosed adverse evidence. Neither the court nor the registrant and his counsel have any way of telling whether there was other adverse evidence in the "record" without seeing the FBI report, which is part of that "record." Since the recommendation is based on the "record" and the "record" includes the secret FBI report, and the final appeal board classification is based on the recommendation, the undis-

closed adverse evidence is made a basis for the denial of the conscientious objector classification. The argument appearing at the bottom of page 44 and the top of page 45 should, therefore, be rejected.

It is stated that the issue of subpoenaing the FBI report "would be irrelevant in determining whether petitioner's classification by the appeal board has a basis in fact." (Respondent's brief, page 45) The issue to be determined, to which the subpoena of the FBI report is relevant, is not whether there was basis in fact. The issue is whether there was a fair résumé of the unfavorable evidence given to the registrant. See page 32 of respondent's brief, where it is conceded that this is the issue. The statement on the top of page 45 is, therefore, wholly irrelevant to the question raised by quashing the subpoena.

XXXIX.

Again it is stated, on the same page, that to allow the subpoena to stand would be "an all-out collateral attack." This is a ridiculous argument. How can it be a collateral attack? It is a direct attack. The issue is: Did the Department of Justice deprive petitioner of procedural right to due process of law? The only way this can be established is by the production of the FBI report. When the FBI report is produced it will not be a collateral attack against the draft board order or proceedings, but a direct attack, showing there has been a deprivation of procedural due process of law.

XL.

Respondent next suggests, on the same page, that "the Department's recommendation has been superseded by the appeal board's decision." This is hardly correct. In fact it is flagrant error. Recall that the order to report is based on the appeal board decision and the appeal board decision is based on the Department's adverse recommendation. The appeal board decision is identical to the recommendation. The recommendation is similar to a general

charge. The decision of the appeal board is like a general verdict. How can it be said that the recommendation (general charge) is not a part of the chain of proceedings? (See *United States v. Romano*, S. D. N. Y., 1952, 103 F. Supp. 597; *Annett v. United States*, 10th Cir., 1953, 205 F. 2d 689; *Taffs v. United States*, 8th Cir., 1953, 208 F. 2d 329; *Hinkle v. United States*, 9th Cir., 1954, 216 F. 2d 8; *Clementino v. United States*, 9th Cir., 1954, 216 F. 2d 10; *Goetz v. United States*, 9th Cir., 1954, 216 F. 2d 270; *Clark v. United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Shepherd v. United States*, 9th Cir., No. 14,105, Dec. 13, 1954, — F. 2d —; *Affeldt v. United States*, 9th Cir., No. 13,941, Dec. 14, 1954, — F. 2d —; *Batelaan v. United States*, 9th Cir., No. 13,939, Dec. 17, 1954, — F. 2d —.) All of these cases held that where the appeal board decision is based on the adverse recommendation of the Department of Justice the draft board order is illegal.

XLII.

At the top of page 46 of respondent's brief it is said that petitioner "has at no time set forth reasons for belief that the F. B. I. report contained information adverse to his claim which was not disclosed to him." This suggestion has heretofore been answered under points XXXIV and XXXV, *supra*.

The subpoena for the FBI report was not issued "in the vague hope that it contains adverse evidence" but so that the trial court could discharge its judicial function to decide that question. This could only be determined by the trial court's seeing the FBI report.

XLII.

On the bottom of page 46 and the top of page 47, it is argued by respondent that the Department of Justice proceedings were "auxiliary and nondecisive" and "purely collateral." It has heretofore been shown that when the report and recommendation of the Department of Justice are relied upon, those proceedings become a link in the

chain action beginning with the registration and ending with the draft board order to report for induction. The only way these proceedings could become irrelevant would be for the appeal board to classify the petitioner as a conscientious objector. Since this was not done, it cannot be said that the proceedings are irrelevant.

XLIII.

On page 47 of the brief the respondent says that "there must be some such showing of special circumstances to justify a court in going behind the record on which the appeal board, which had the duty of classifying, acted." It heretofore has been pointed out in the quoted part of the Department of Justice recommendation, *supra*, under point XXXVIII, that it is based on the entire "record" of the Department of Justice, which includes the entire FBI report. This is a special circumstance. The very fact that the Department of Justice told the appeal board that it had the "record" shows that the appeal board was led to believe that the Department of Justice had more than was specified in the recommendation. A mere statement of some of the evidence as basis for its recommendation does not dispel the suggestion that the Department had other evidence appearing in its "record," referred to in the recommendation.

XLIV.

It is stated on page 47 of its brief by the respondent that this Court must rely upon the presumption of regularity in administrative proceedings. Notwithstanding *Koch v. United States*, 4th Cir., 1945, 150 F. 2d 762, 763, and *United States v. Fratricks*, 7th Cir., 1944, 140 F. 2d 5, 7, to the contrary, petitioner says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1,

§101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop v. United States*, 165 U. S. 486 (1897), and *Edwards v. United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

It is submitted, therefore, that it is erroneous for the respondent to contend that the presumption of regularity can be relied on in criminal proceedings.

XLV.

It is argued in respondent's brief, at pages 48-49, that there is no showing of materiality. To begin with, this is not a motion under Rule 16 of the Federal Rules of Criminal Procedure. The subpoena has been issued under Rule 17(c). The rule for determining the validity of a subpoena is entirely different from that of determining the merit of pretrial discovery. It is impossible to determine materiality of the document on quashing the subpoena.—See petitioner's main brief, at pages 68-70.

CONCLUSION

For the reasons stated above and for those appearing in the main brief for petitioner, it is submitted that the judgment of the court below should be reversed.

Respectfully,

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January, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 24-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing a petition for a writ of certiorari was extended to August 14, 1954, by order of Mr. Justice Minton, and the petition was filed on July 30, 1954. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was basis in fact for the denial by the Selective Service System of petitioner's claim to classification as a conscientious objector.

2. Whether the court below erred in affirming the quashing of a subpoena to produce confidential F.B.I. records, submitted to the Department of Justice hearing officer, in order to enable petitioner to compare their contents with the resumé of adverse information orally given him at the time of his hearing.

3. Whether a sufficient resumé of such information was given to petitioner.

STATUTE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. 456(j)), provides in pertinent part:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociologi-

cal, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are

found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois which, after a trial without jury, found petitioner guilty of refusing on February 9, 1953, to be in-

ducted into the armed services in violation of the Universal Military Training and Service Act (R. 1, 3, 14).¹

Petitioner's record with the Selective Service System may be summarized as follows:

On September 10, 1948, petitioner, who was then age 21 and single, registered under the Selective Service laws in Waukegan, Illinois (R. 17, 38, 39-40).² In his Selective Service questionnaire which he returned on December 6, 1948, he indicated that he was employed as a chauffeur at the Great Lakes Naval Training Center, in Great Lakes, Illinois; that he had entered into this employment on February 9, 1948; that he expected to continue in this work indefinitely (R. 43); and that he had no other employment (R. 44). He indicated as his educational background eight years of grade school and 2½ years of high school (R. 44). He left blank the space in which conscientious objectors indicate their claim to such status (R. 44); he certified that he was not a minister (R. 43); and he stated his belief that his classification should be 1-A (R. 44-45). Petitioner was admittedly not a conscientious objector at this time (R. 25-26). On the basis of the information contained in this questionnaire, petitioner's Selective Service Board classified him 1-A on December 23, 1948 (R. 45).

On March 5, 1949, petitioner was married (R.

¹ Petitioner was given a sentence of two years' imprisonment (R. 14-15).

² Petitioner was rejected for service in the armed services in 1943 (R. 40).

16). On May 25, 1951, he was ordered to report for a physical examination (R. 70), but this was cancelled on May 31, 1951, in a letter advising petitioner that his file would be reviewed, apparently because of the change in marital status since his questionnaire had been submitted (R. 69). On June 4, 1951, he was reclassified 3-A, and was notified on June 6, 1951, that he had been granted a dependency exemption (R. 45).

On October 22, 1951, petitioner was again tentatively placed in class 1-A (R. 27, 45) and he was sent a classification notice to this effect on October 23, 1951 (R. 45).³ On October 25, 1951, petitioner was sent a special form for conscientious objectors by his local board at his request, which he executed and returned on October 30, 1951 (R. 28, 46-51). This form indicates that petitioner affixed his signature to that part of the form set forth for those claiming exemption from participation in war in any form or in non-combatant training (R. 46). In answer to the question under which circumstances he believed in the use of force, he replied (R. 47) "None whatsoever. Unless it be under the supervision of Jehovah God." He stated that the public expression of his views was made "from House to House, and on the street in Waukegan, Illinois" (R. 48), and although he did not further

³ This reclassification apparently came about because of the provisions of the Act of June 19, 1951, ch. 144, title 1, sec. 1 (a), 50 U.S.C. App. 456(h), which removed the President's authority to defer married men who have no dependents (other than a wife) solely on the basis of the marriage, unless extreme hardship is involved.

explain his activities he stated that he spent "45 hours a month in the service of Jehovah God" (R. 48). He indicated that his education ended after 2½ years in high school, and that he had been up to 1951 (and apparently still was) a federal civil service chauffeur in the Great Lakes Naval Station (R. 48; see also R. 53).⁴

By letter dated October 30, 1951, petitioner was notified to appear for a physical examination on November 13, 1951 (R. 70). After examination he was found acceptable for induction and he was so notified (R. 68). On November 26, 1951, petitioner's local board classified him 1-A and advised him of this fact on November 27, 1951 (R. 17, 40, 45). Following such notification, petitioner requested a hearing (R. 71) "to give further proof of my ministry", saying nothing of a claim to being a conscientious objector.

At this hearing which was held before his local board on December 10, 1951 (R. 17), petitioner appeared alone without witnesses, and the only mate-

⁴ On the trial of this case, petitioner testified that he had filled out the special form for conscientious objectors to support his claim to being a minister, and that he thought that in making this application he was applying for a minister's classification (R. 28-31). He admitted that he did not discuss his conscientious objector claim with the board (R. 31) but took the position that as a minister, who had made a covenant to serve in that capacity, he had to be a conscientious objector (R. 29-31).

Petitioner testified that he was ordained as a minister on October 28, 1951 (R. 24). Since his conscientious objector form was received at his local board on October 30, 1951 (R. 46), it would appear that his ordination was simultaneous with the claim of exemption.

rial submitted to the board was his special form for conscientious objectors (R. 27), and a booklet that he showed the board members, entitled "God and the State" (R. 30).⁵ The minutes of the board reflect that petitioner gave substantially the same evidence orally that he set forth in his special form, and that "he made the statement he was seeking classification as a minister and *not* as a conscientious objector" (R. 68-69). Petitioner admits that he furnished evidence at the hearing (R. 18) "in support of my ministry" and that he did not inform the board that he desired exemption as a conscientious objector (R. 27-28, 31). Petitioner told the board that he had been an unordained minister of Jehovah's Witnesses since December 1950, but that he was not ordained until October 1951 when that became his "regular vocation" (R. 18). The board members, petitioner contends, questioned him concerning his education for the ministry and when he told them that he had not gone beyond 21½ years of high school, expressed some doubt as to his qualification as a minister (R. 18).

The board notified petitioner by letter dated December 11, 1951, that the evidence was insufficient to merit reopening his 1-A classification (R. 18, 66). Petitioner answered by letter received at the local board on December 18, 1951, stating that he was a "regular minister of religion", and that he wished to appeal his case to the Appeal Board (R. 64-65).

⁵ There is also a letter in the record restating petitioner's claim that he was a minister, presumably filed with the local board after the hearing (R. 66-68).

After his records were forwarded to the Appeal Board (R. 40-41), he was tentatively classified 1-A, and it was determined that he failed to qualify for either of the two forms of conscientious objector status, 1-A-0 or 1-0 (R. 45-46).

On August 28, 1952, a conscientious objector hearing was conducted before a Department of Justice hearing officer. Petitioner attended, bringing his wife as his only witness (R. 19, 32-33). During this hearing, according to petitioner's own testimony, the hearing officer told him that his F.B.I. report stated that he had been "hanging around pool rooms", and asked him whether he still was doing so, to which question he replied in the negative (R. 19). Petitioner's wife who was present in the hearing room was asked how petitioner was treating her and she replied, "fine" (R. 19). The hearing officer recommended against reopening petitioner's classification (R. 54). The Department of Justice recommendation adopted this position. It noted that while there was some evidence of present sincerity, the entire record did not support deferment. The report mentioned that petitioner has been known to one informant as "a rather heavy drinker and crap shooter in and around local taverns and pool halls", although that informant believed that he was then sincere. It also noted that police records showed that petitioner was arrested May 29, 1950, on a complaint by his wife that he pulled her out of a car and hit her in the face, for which crime he was fined; that police were called to settle a "hot argument" on

June 12, 1950; and on January 6, 1952, petitioner's wife made a complaint to police that petitioner was abusive. (R. 54.) It emphasized that petitioner did not claim to be a conscientious objector when he mailed his questionnaire in 1948, and that his religious activities were coincident with pressure from the draft.

On December 17, 1952, the Appeal Board by vote of 3 to 0 again classified petitioner as 1-A (R. 19, 41).

On January 6, 1953, petitioner was ordered to report to his local board for forwarding to an induction station on January 16, 1953 (R. 35, 56-57). On that day his physical examination was not completed and it was necessary for him to report back on January 22nd and January 27th, on which later date it appeared that his examination records had been misplaced and he was told to call in for further information (R. 36-37, 60-62, 63-64, 71-72). He received permission from his local board to go back to work until February 9th, when he was told to report for induction (R. 36-37).

On January 20, 1953, fourteen days after his order to report for induction, petitioner filed an affidavit with his local board signed by a doctor, and stating that petitioner's wife was then a patient in a tuberculosis sanitarium and that she would be dependent on her husband for care when she left the sanitarium (R. 63; Gov't Ex. 1-W). He told the clerk of his local board that he wished to have his classification reopened on the ground of dependency and family hardship, and, according to his own testimony, he was told that when the

board met they would consider this new claim (R. 20-21). On February 2, 1953, he was told that his classification would not be reopened (R. 22). On February 3, 1953, petitioner communicated with his State Selective Service Director and the National Director regarding his claim for dependency exemption and sent each a copy of the doctor's affidavit relating to his wife's physical condition (R. 23, 58-59). He was notified by the State Selective Service Headquarters on February 11, 1953, that since his application was not received until February 5, 1953, it was out of time (R. 59-60). On February 5, 1953, his local board had again classified petitioner 1-A (R. 39).

On February 9, 1953, petitioner reported to the induction station but refused to submit to induction (R. 37-38, 51, 55-56, 57-58, 72-73).

ARGUMENT

1. This case differs from *Sicurella v. United States*, No. 250, this Term, in which the government has conceded a conflict between the decision of the court below and other circuits, because in this case the record shows and the opinion below holds that there was ample basis for the selective service boards to conclude that petitioner had not established the *sincerity* of his claim to be a conscientious objector. Thus, the issue of what sincerely held beliefs may be deemed compatible with a right to deferment under the statute—the issue involved in *Sicurella*—is not reached at all in this case.

It is clear from the record that the finding against

petitioner does not rest on the recency of his conversion alone. It was the coincidence of his conversion with the imminence of his induction, the nature of his past activities, his employment at a naval station, his continued abusive treatment of his wife after his alleged conversion, the lack of any articulate concept of conscientious objection divorced from the claim to be a minister, which together led the Department of Justice and presumably the draft boards to the conclusion that petitioner had failed to establish his sincerity. The asserted conflict with *Schuman v. United States*, 208 F. 2d 801 (C.A. 9), does not exist. The *Schuman* decision, resting on a different set of circumstances, represents not a conflict with respect to the applicable law, but a different conclusion on the basis of different facts. The court there stressed that the hearing officer and at least one member of a two-member local board explicitly recognized the defendant's sincerity, but nevertheless rejected his claim.⁶ Here, on the other hand, the facts clearly afford sufficient basis for a finding that petitioner had not shown the sincerity of his claim. Such a finding is final and unimpeachable, even if it were erroneous. *Cox v. United States*, 332 U.S. 442, 448-449.

⁶ We do not read the *Schuman* opinion, as does the court below (Pet. 31), as declaring that the recency of a conversion can never be taken into account. Rather, the Ninth Circuit seems to us to have held no more than that, once a classifying agency (hearing officer or board) has determined that the registrant is sincere, it cannot reject his claim for deferment simply because he has been connected with the faith for only a short time.

Petitioner also asserts a conflict with the decision in *Dickinson v. United States*, 346 U.S. 389, in that the government failed to overcome by any "affirmative evidence" his claim that he was a conscientious objector. But in that case, with respect to a ministerial claim, this Court found that the registrant had "made out a case which meets the statutory criteria" (p. 395), and held (p. 396) that the court below erroneously "thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence." For the factual reasons detailed above (*supra*, pp. 5-10, 12), that is not this case. This petitioner was not arbitrarily denied exemption on the basis of mere disbelief in his declarations and evidence, and the question of whether a Department of Justice hearing officer or the board would be required to credit allegations of conscientious objection, in the absence of any objective contrary evidence, is not presented under these facts.

Moreover, if the question were involved, we would support the view that the court below was correct in holding that the rule of the *Dickinson* case with respect to ministerial claims cannot be applied in totality to conscientious objector claims. In addition to the differentiating factors pointed out in the opinion below (Pet. 26-29), the legislative history of Section 6(j) providing for hearing and report by the Department of Justice, which is discussed in detail in the government's brief in *United States v. Nugent* (No. 540, O.T. 1952), shows that the main purpose of that section was

to provide the draft boards with an appraisal of the sincerity of a registrant's claim by an outside agency on the basis of a personal interview. As the *Nugent* decision, 346 U.S. 1, makes clear, that appraisal is not binding on the draft boards, but the statute clearly contemplates that it is a factor which the draft boards may properly consider with the other facts of record. In other words, the statute specifically, envisages that where the issue is conscientious objection (as distinguished from ministerial status) belief or disbelief in the registrant's testimonial and documentary evidence, standing alone, was definitely to be taken into account.⁷

2. Prior to the trial of this case, petitioner attempted to subpoena the confidential F.B.I. report which was submitted to the Department of Justice hearing officer at the time of the conscientious objector hearing. The government moved to quash the subpoena, and in his affidavit in opposition to this motion, petitioner's counsel stated that petitioner would have to examine the confidential report and to offer it into evidence (R. 6-9). The court granted the motion to quash (R. 9-10).

Petitioner now contends that the court erred

⁷ For these reasons, we do not agree with the dicta in *Weaver v. United States*, 210 F. 2d 815 (C. A. 8), and the other cases cited in the opinion below (Pet. 27), to the extent that they suggest that the principle of the *Dickinson* case fully applies to conscientious objector claims. However, there is no conflict of decision between those cases and the ruling below because, as noted above (*supra*, p. 13), there was no violation of the *Dickinson* rule here, assuming it to be applicable.

in not allowing him access to the report in order to check it against the information furnished him by the hearing officer concerning it (Pet. 22-23). The contention that a registrant is entitled to inspect such records was raised and settled in *United States v. Nugent*, 346 U.S. 1, where this Court said (*Ibid.* pp. 5-6):

* * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the FBI reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair resumé of any adverse evidence in the investigator's report.

See also *United States v. Dal Santo*, 205 F. 2d 429, 431-432 (C.A. 7), certiorari denied, 346 U.S. 858. It cannot be presumed that the hearing officer's recommendation was based on confidential data not indicated in his report, in the absence of some showing by petitioner that such was the case. The authority of that officer is advisory and his report, together with the Selective Service file, must be deemed to cover all the pertinent data upon which the Appeal Board based its final classification order. Any other rule would necessitate a full-

scale collateral review of this auxiliary proceeding which review, for the reasons this Court noted in the *Nugent* case (346 U.S. at 8-10), is neither secured to petitioner by statute nor by his constitutional right to due process of law.

There are district court opinions, which petitioner cites ⁸ (Pet. 22-23), which have held that, at a trial, a registrant is entitled to have the F.B.I. reports produced for his examination ⁹ to test out the question whether the resumé given to the registrant by the hearing officer was a fair one. This issue was raised on a joint petition for rehearing, which was denied by this Court, filed in the *Nugent* case and its companion *Packer* case (Nos. 540 and 573, O.T. 1952, pp. 44-46). Counsel there relied on the decision of Judge Hincks in *United States v. Evans*, 115 F. Supp. 340 (D. Conn.), the leading district court decision in this field which the other cases cited by petitioner have followed.

It is difficult to reconcile the *Evans* decision with the ruling of this Court in *Nugent*. It is anomalous to hold that a petitioner cannot see the F.B.I. reports before hearing, but can see them after the recommendation has gone to the Appeal Board and been acted upon. There may perhaps be special circumstances, as for example if the facts in the resumé given to a registrant are

⁸ Petitioner does not assert a conflict of circuits on this point, but cites only district court rulings. See Pet. 22-23, 37, 39.

⁹ The district court opinions have held that the court need not itself first examine the reports but that the reports must be shown to the registrant, except that the names of persons interviewed may be omitted.

substantially different from those referred to in the report, where the interests of justice may require a court to examine the file. But we think that, unless such special circumstances are shown, the *Nugent* case does not permit the granting of such a subpoena as a matter of course in every case.

However, if the Court does not deem this issue determined by *Nugent*, we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal.

3. Petitioner also contends (Pet. 20-22) that the report of the hearing officer indicates that adverse evidence was not made available to him at the time of the hearing, as required by the *Nugent* decision. Reference to the report, however, indicates that he was given full opportunity to meet all of the evidence considered in that report.

One piece of information taken from the confidential file was the statement of an informant to the effect that petitioner had been personally known to him (R. 54) "as a rather heavy drinker and crap shooter in and around local taverns and pool halls", but that the informant believed that he was then sincere. Following the notation regarding this informant in the report, the hearing officer made the following notation indicative of the fact that he had gone into this issue with petitioner and discussed it with him fully (R. 54):

Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed.

Petitioner, in fact, admitted that he had been advised that his report contained this information and in response to a question (R. 19) "Do you do that now?", he answered in the negative.

The hearing officer's report also refers to "police records" indicating various instances when petitioner physically abused his wife (R. 54). This information was certainly available to the petitioner at all times, being a matter of public record, and the report does not indicate that it was taken from confidential sources. Petitioner's testimony indicates that the hearing officer questioned his wife in his presence concerning his treatment of her, and she answered that he had been treating her "fine" (R. 19). We fail to perceive any support for the contention that all relevant information was not available to petitioner, or that his classification was based on confidential data of which he was not advised.

Petitioner's present argument seems to come down to a contention that the *Nugent* decision requires that each claimant be furnished in a formalized document a detailed analysis of all adverse material available to the hearing officer. We find no such requirement set forth in that decision. This Court stated that the advisory conscientious objector hearing provided for in the statute does not comprehend (346 U.S. at 7) "formal and

litigious procedures", nor is it a "full-scale trial" (*Ibid.* p. 9). We interpret the decision to mean that the claimant is entitled to be informed, at least orally at the hearing, of the "general nature and character of any evidence which [is] unfavorable to his claim" (*Ibid.* p. 6, fn. 10), in order that he may meet each such issue and in order that the possibility of a finding based on evidence of which he was not fairly informed may be precluded. That was done in this case, and no more formalized procedure is constitutionally requisite, nor is it provided for by statute.¹⁰

¹⁰ No court of appeals has held that the claimant is entitled to a full formal summary of the adverse evidence in the file. See Pet. 37. An argument substantially similar to that made by petitioner was made in the petition for rehearing in the *Nugent* and *Packer* cases (*supra*, p. 16).

CONCLUSION

The decision below is clearly correct on the facts, and the general issues of law presented by petitioner are either not actually involved or do not call for review at this time.¹¹ It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, unless the Court desires to grant a limited writ for the reason stated above at p. 17.

SIMON E. SOBELOFF,
Solicitor General.

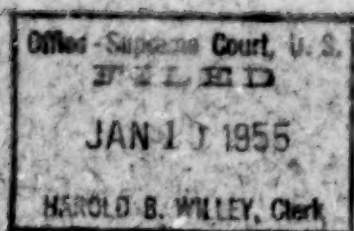
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AUGUST, 1954

¹¹ The contention (Pet. 5-6) respecting the doctor's letter submitted to the local board on January 20, 1953, after petitioner had received his notice to report, is obviously peculiar to this case. The petition does not discuss it under the heading "Reasons for Granting the Writ" (Pet. 13-23).

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SUPREME COURT, U. S.



No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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OCTOBER TERM, 1954

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ROBERT SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 77-92) is reported at 213 F. 2d 901.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954 (R. 92). The time for filing a petition for a writ of certiorari was extended to August 14, 1954, by order of Mr. Justice Minton (R. 93), and the petition was filed on July 30, 1954. The petition was granted on October 14, 1954 (R. 93). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was basis in fact for the denial by the selective service appeal board of petitioner's claim for exemption as a conscientious objector.

2. Whether the petitioner's hearing before the Department of Justice was unfair or prejudicial to him.

3. Whether the trial court erred in refusing to require the production at the trial of the confidential Federal Bureau of Investigation investigatory report, where the registrant made no showing that the decision of the appeal board or the recommendation of the Department of Justice was based upon adverse evidence in such report which had not been disclosed to him.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Universal Military Training and Service Act and the implementing regulations of the Selective Service System and the Department of Justice are set forth, *infra*, pp. 51-58.

STATEMENT

Petitioner was found guilty, after a trial without a jury, of refusing, on February 9, 1953, to be inducted into the armed services in violation of Section 12 (a) of the Universal Military Training and Service Act (R. 1, 3, 14).¹ On appeal, the Court of Appeals for the Seventh

¹ Petitioner was sentenced to two years' imprisonment (R. 14-15).

Circuit affirmed the judgment of conviction, holding that the induction order was based on a valid Selective Service classification.

Petitioner's record with the Selective Service System may be summarized as follows: On September 10, 1948, petitioner, who was then 21 years old and unmarried, registered under the Selective Service laws in Waukegan, Illinois (R. 17, 38, 39-40).² In his selective service questionnaire which he returned on December 6, 1948, he indicated that he was employed as a chauffeur at the Great Lakes Naval Training Center, in Great Lakes, Illinois; that he had entered into this employment on February 9, 1948; that he expected to continue in this work indefinitely (R. 43); and that he had no other employment (R. 44). He indicated as his educational background eight years of grade school and 2½ years of high school (R. 44). He left blank the space in which conscientious objectors indicate their claim to such status (R. 44); he certified that he was not a minister (R. 43); and he stated his belief that his classification should be 1-A (R. 44-45). On the basis of the information contained in this questionnaire, petitioner's selective service board classified him 1-A (available for military service) on December 23, 1948 (R. 45).

On March 5, 1949, petitioner was married (R. 16). On June 4, 1951, he was reclassified

² Petitioner was rejected for service in the armed services in 1943 (R. 40).

3-A (deferred for reasons of dependency), and was notified on June 6, 1951, that he had been granted a dependency deferment (R. 45).

On October 22, 1951, petitioner was again tentatively placed in class 1-A (R. 27, 45) and he was sent a classification notice to this effect on October 23, 1951 (R. 45).³ On October 30, 1951, he filed the special form for conscientious objectors, claiming exemption from both combatant and noncombatant service (R. 46-51). In answer to the question as to the circumstances under which he believed in the use of force, he replied (R. 47), "None whatsoever. Unless it be under the supervision of Jehovah God."

In describing his beliefs he stated (R. 47):

Romans 13:1—States that Jehovah God and Christ Jesus are the higher powers and that I recognize them as the supreme powers. Peter at Acts 5:29 admonishing all footstep followers of Christ Jesus that "we must obey God rather than men."

Also Paul at 2 Cor. 4:4 states Satan the Devil is the God of this system of things. Showing that we should obey the Creator rather than the Creation of God. Jehovah

³ This reclassification apparently came about because of the provision of the Act of June 19, 1951, ch. 144, title 1, sec. 1 (o), 50 U. S. C. App. 456 (h), which removed the President's authority to defer married men who have no dependents other than a wife solely on the basis of the marriage, unless extreme hardship is involved.

God in one of his Ten Commandments at Ex. 20: 13. "Thou shall not kill."⁴

He stated that the public expression of his views was made "from House to House, and on the street in Waukegan, Illinois" (R. 48), and although he did not further explain those activities he stated that he spent "45 hours a month in the service of Jehovah God" (R. 48). He indicated that he had been up to 1951 (and apparently still was) a federal civil service chauffeur at the Great Lakes Naval Station (R. 48; see also R. 53).⁵

⁴ Petitioner has erroneously summarized this material as follows (Pet. 8):

"Simmons filed with his local board on October 30, 1951, his conscientious objector form. He signed Series I (B) showing that he was opposed to both combatant and noncombatant military service. He answered that he believed in the Supreme Being. He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and also that he could not violate the commandments of God that prohibit killing."

⁵ On the trial of this case, petitioner testified that he had filled out the special form for conscientious objectors to support his claim to being a minister, and that he thought that in making this application he was applying for a minister's classification (R. 28-31). He admitted that he did not discuss his conscientious objector claim with the board (R. 31) but apparently took the position that as a minister he had to be a conscientious objector (R. 29-31).

Petitioner testified that he was ordained as a minister on

Petitioner was found acceptable for induction and he was so notified (R. 68). On November 26, 1951, he was classified 1-A (R. 17, 40 45). Petitioner requested a personal appearance before the local board "to give further proof of my ministry", saying nothing of a claim to being a conscientious objector (R. 71).

At his personal appearance before his local board on December 10, 1951 (R. 17), petitioner appeared alone without witnesses, and the only material submitted to the board was his special form for conscientious objectors (R. 27), and a booklet entitled "God and the State" which he showed the board members (R. 30).⁶ The minutes of the board reflect that petitioner gave orally substantially the same evidence that he had set forth in his special form, and that "he made the statement he was seeking classification as a minister and *not* as a conscientious objector" (R. 68-69). Petitioner admits that he furnished evidence at the hearing (R. 18) "in support of my ministry" and that he did not inform the board that he desired exemption as a conscientious objector (R. 27-28, 31). Petitioner told the board that he had been an unordained minister of Je-

October 28, 1951 (R. 24). Since his conscientious objector form was received at his local board on October 30, 1951 (R. 46), it would appear that his ordination was simultaneous with the claim of exemption.

⁶ There is also in the record a letter filed with the local board, presumably after his personal appearance, in which petitioner restated his ministerial claim (R. 66-68).

hovah's Witnesses since December 1950, but that he was not ordained until October 1951 when that became his "regular vocation" (R. 18).

The board notified petitioner by letter dated December 11, 1951, that the evidence was insufficient to merit reopening his 1-A classification (R. 18, 66). Petitioner answered by letter received at the local board on December 18, 1951, stating that he was a "regular minister of religion", and that he wished to appeal his case to the appeal board (R. 64-65). After his records were forwarded to the appeal board (R. 40-41), it was tentatively determined that he failed to qualify for either of the two forms of conscientious objector exemption, 1-A-0 (available for noncombatant military service) or 1-0 (exempt from all military service) (R. 45-46). Thereupon, his case was referred to the Department of Justice.

On August 28, 1952, a conscientious objector hearing was conducted before a Department of Justice hearing officer. There is no evidence that, prior to the hearing, petitioner made any request for information adverse to his claim.⁷

⁷ The procedure in effect at the time of the hearing required that the registrant be notified of the time and place of the hearing and that he be furnished with written instructions informing him of his various rights including his right, *prior to the hearing and upon his request*, to be advised of the general nature and character of any evidence in the possession of the hearing officer adverse to his claim. Since the form of notice and instructions which petitioner has printed as Appendix B to his brief (Pet. Br. 75-76) were not in effect at the time of the Department of Justice

He attended, bringing his wife as his only witness (R. 19, 32-33). During this hearing, according to petitioner's own testimony, the hearing officer told him that the Federal Bureau of Investigation report stated that he had been "hanging around pool rooms", and asked him whether he still was doing so, to which question he replied in the negative (R. 19). Petitioner's wife who was present in the hearing room was asked how petitioner was treating her and she replied, "fine" (R. 19). The hearing officer recommended against reopening petitioner's classification (R. 54.)

The Department of Justice recommendation (R. 52-55) was adverse to petitioner's claim. It sets forth in some detail petitioner's background. It noted that petitioner had supported his statements of belief by citations to the Scriptures and that the general tenor of his claim was that he objected to submitting to governmental authority. The only religious activities noted were "Bible book study," "training from the Watchtower Bible and Tract Society" and "preaching from house to house and on the streets" (R. 53). It noted that while there was some evidence of present sincerity, the entire record did not support deferment. The Department's recommendation states

hearing which petitioner now attacks on procedural grounds, and were not in use until after July 1953, we have appended hereto (*infra*, pp. 55-58) the correct version of the form and instructions which were sent to registrants in 1952.

that petitioner has been known to one informant as "a rather heavy drinker and crap shooter in and around local taverns and pool halls," although that informant believed that he was then sincere. It also noted that police records which had been consulted showed that petitioner was arrested May 29, 1950, on a complaint by his wife that he pulled her out of a car and hit her in the face, for which he was fined; that police were called to settle a "hot argument" on June 12, 1950; and that on January 6, 1952, petitioner's wife made a complaint to police that petitioner was abusive. (R. 54.) It emphasized that petitioner did not claim to be a conscientious objector when he mailed his questionnaire in 1948, and that his religious activities were coincident with the threat of induction.

On December 17, 1952, the appeal board by vote of 3 to 0 classified petitioner as 1-A (R. 19, 41).

On January 6, 1953, petitioner was ordered to report to his local board for forwarding to an induction station on January 16, 1953 (R. 35, 56-57). On that day his physical examination was not completed and it was necessary for him to report back on January 22d and January 27th, on which latter date it appeared that his examination records had been misplaced and he was told to call in for further information (R. 36-37, 60-62, 63-64, 71-72). He received permission

from his local board to go back to work until February 9th, when he was told to report for induction (R. 36-37).

On January 20, 1953, fourteen days after his order to report for induction, petitioner filed an affidavit with his local board signed by a doctor and stating that petitioner's wife was then a patient in a tuberculosis sanitarium, and that she would be dependent on her husband for care when she left the sanitarium (R. 63; Gov. Ex. 1-W). He told the clerk of his local board that he wished to have his classification reopened on the ground of dependency and family hardship, and, according to his trial testimony, he was told that when the board met they would consider this new claim (R. 20-21). On February 2, 1953, he was told that his classification would not be reopened (R. 22). On February 3, 1953, petitioner communicated with his State Selective Service Director and the National Director regarding his claim for dependency exemption and sent each a copy of the doctor's affidavit relating to his wife's physical condition (R. 23, 58-59). He was notified by the State Selective Service Headquarters on February 11, 1953, that since his application was not received until February 5, 1953, it was out of time (R. 59-60). On February 5, 1953, his local board had again classified petitioner 1-A (R. 39). On February 9, 1953, petitioner reported to the induction station but refused to

submit to induction (R. 37-38, 51, 55-56, 57-58, 72-73).

Prior to the trial of this case, petitioner filed a subpoena duces tecum demanding the production of the confidential F. B. I. investigatory report which had been made available to the Department of Justice hearing officer at the time of his conscientious objector hearing (R. 5-6). The government filed a motion to quash the subpoena. Petitioner's attorney thereupon filed an affidavit in opposition to the motion to quash setting forth, *inter alia*, that (R. 7) "It is necessary that the defendant examine and see such [F. B. I.] report relied on against him in the administrative agency in order to properly defend at the trial of the indictment in this case"; and (R. 9) "a denial of the right to offer into evidence the Federal Bureau of Investigation report in this case will be prejudicial and will deprive the defendant of his right to be confronted by evidence given by the witnesses responsible for denial of the conscientious objector status." When the United States Attorney and an F. B. I. agent appeared as custodians of the report in obedience to the subpoena, the court ordered that it be quashed (R. 9-10).

SUMMARY OF ARGUMENT

A. When petitioner registered with his local board in 1948, he did not claim to be either a conscientious objector or a minister, and he was

classified I-A (available for military service). He first sought exemption as a conscientious objector in 1951, upon the termination of the dependency deferment which had followed his marriage, and his reclassification as I-A. The religious conversion underlying his claim of exemption occurred after his registration, and he was a civilian employee in a United States naval facility both before and after his asserted change. Both in his personal appearance before the local board and in taking an appeal to the appeal board, petitioner pressed only his claim for exemption as a minister. Moreover, his violent and abusive treatment of his wife between 1950 and 1952 certainly bears on the sincerity of his assertion of religious scruples against participation in war in any form. These circumstances constituted an ample basis in fact for the appeal board's denial of petitioner's claim for exemption as a conscientious objector. *Estep v. United States*, 327 U. S. 114, 122-123. Thus, this case does not, as petitioner contends, present a question as to whether such a claim can be denied solely upon the ground that the registrant's scruples were acquired coincident with the threat of induction.

B. Petitioner's argument that there was no basis in fact for denial of his claim for exemption as a conscientious objector, is based on the assumption that his mere assertion of his claim is sufficient to make out a *prima facie* case for such status. His argument is founded on a

misapprehension of the decision of this Court in *Dickinson v. United States*, 346 U. S. 389, where this Court held, with respect to a claim for a ministerial exemption, that when a registrant has reinforced his claim by testimony and documentary evidence, a local board is not free to disbelieve him in the absence of affirmative impeaching or contradictory evidence.

This Court has never suggested that the unique tribunals created by Congress to administer the Universal Military Training and Service Act must in all cases accept as sufficient the unsupported statements of a registrant who has the burden of showing that he is entitled to exemption. Moreover, *Dickinson* involved a claim for ministerial exemption which hinges upon the relatively objective issues of whether the registrant practices as a minister and his status in relation to the other members of his religious group. However, a claim for exemption as a conscientious objector involves the subtle and subjective issue of the sincerity of the registrant's alleged convictions. Such issues must be largely resolved upon the inferences which may be drawn from demeanor, the circumstances in which the claim is asserted, and the registrant's daily life. In the instant case, the facts and circumstances surrounding petitioner's claim for exemption as a conscientious objector constituted an ample basis in fact for the denial of his claim, particularly since the

petitioner's case consisted of only his unsupported statements.

II

Petitioner contends that he was denied a fair hearing by the Department of Justice in that the hearing officer failed to inform him of evidence adverse to his claim. Although petitioner was informed that, upon his request prior to the hearing date, he would be furnished with a résumé of any adverse evidence in the possession of the hearing officer, he made no such request prior to the hearing. The principal contention here is that the hearing officer failed to disclose to petitioner that he had information, obtained from police records, that petitioner had treated his wife with violence and abuse subsequent to his alleged religious conversion, although this conduct was relied upon by the Department of Justice in recommending that petitioner's claim be denied. Since the hearing officer, after referring to the F. B. I. investigatory report and to information in that report concerning petitioner's earlier gambling, asked petitioner's wife in his presence how he was treating her, petitioner was adequately informed that the hearing officer was aware of his maltreatment of her. Petitioner does not allege that he did not understand this reference to his treatment of his wife. Moreover, the fact he does not even allege that he was prejudiced, in that he would have denied

or justified his conduct as derived from police records, requires that his classification by the appeal board be sustained. *Market Street Railway Co. v. Railroad Comm. of California*, 324 U. S. 548, 561-562.

III

The trial judge properly quashed the petitioner's subpoena seeking to compel production, prior to trial, of the F. B. I. investigatory report on his claim for exemption. The petitioner contends that he (and any other registrant in his position) must be furnished the report to enable him to determine whether it contained information adverse to his claim which was not disclosed to him by the Department of Justice hearing officer. This contention overlooks the auxiliary role of the Department of Justice in these cases, the limited record before the selective service appeal board which alone had the power of decision, and the necessity for a showing of cause before courts will undertake such collateral inquiries.

In *United States v. Nugent*, 346 U. S. 1, this Court, recognizing the limited advisory function of the Department and the summary, informal character of the entire classification process, held that a registrant need not be furnished with the F. B. I. investigatory report in connection with the hearing before the Department. It would be anomalous if the "all-out collateral attack" which this Court refused to permit in the auxiliary proceedings of the Department can never-

theless be undertaken in enforcement proceedings in which the courts determine only whether the appeal board's decision has a basis in fact.

The selective service appeal board received the recommendation of the Department of Justice, but not the report of the hearing officer or the F. B. I. investigatory report. Thus, the appeal board, in making the decision, had before it only such adverse information from the F. B. I. report as was set forth in the Department's recommendation, and which had been disclosed to petitioner by the hearing officer. Where the appeal board's decision has ample basis in fact, it should not be set aside on the ground that there may exist other evidence adverse to petitioner's claim but unknown to the appeal board.

Petitioner has stated no cause for belief that the F. B. I. investigatory report contained evidence adverse to his claim which was not disclosed to him and which may have influenced the Department's recommendation. Since the recommendation is expressly based upon evidence which was disclosed to the petitioner, it should not be presumed that it was based upon undisclosed matters. Decisions holding that the government ordinarily may not withhold relevant evidence from a court which is the trier of facts do not require here a collateral inquiry, without any showing of justification, into the formulation of a Department of Justice recommendation which was not binding upon the appeal board.

ARGUMENT

I

THE APPEAL BOARD PROPERLY DENIED PETITIONER'S
CLAIM FOR EXEMPTION AS A CONSCIENTIOUS OB-
JECTOR

Petitioner concedes (Pet. Br. 29) that, in a criminal prosecution for refusal to be inducted under the Universal Military Training and Service Act, a registrant's classification by the selective service authorities may be held invalid only if it is without "basis in fact." *Estep v. United States*, 327 U. S. 114, 122-123; *Dickinson v. United States*, 346 U. S. 389, 394. However, he contends that the denial of his claim for exemption as a conscientious objector lacks a basis in fact. Moreover, he asserts that under this Court's decision in *Dickinson v. United States*, *supra*, the selective service authorities must accept as true his statements as to his conscientious objections, without regard to the surrounding circumstances, unless there is adduced affirmative evidence explicitly rebutting his statements. We contend that there was ample basis in fact for the appeal board's denial of petitioner's claim for exemption. We submit, further, that petitioner misreads the *Dickinson* decision even as applied to ministerial claims and that, in any event, the rationale of the decision does not apply to conscientious objector claims.

A. THERE WAS AMPLE BASIS IN FACT FOR THE DENIAL OF
PETITIONER'S CLAIM FOR EXEMPTION

In 1948, when petitioner registered with his local board and filled out his selective service questionnaire, he was admittedly neither a minister nor a conscientious objector. Accordingly, in December 1948, petitioner was classified 1-A (available for military service). Petitioner married in 1949 and, from June to October 22, 1951, he was classified 3-A (dependency deferment). On October 22, 1951, the local board placed petitioner in class 1-A, and he was sent a classification notice to this effect on October 23, 1951 (R. 45). Petitioner immediately requested the Selective Service Form 150, Special Form for Conscientious Objectors (R. 28), for it was sent to him on October 25 (R. 46). On October 28, according to petitioner's testimony at the trial, he was ordained as a minister (R. 26). On October 30, his executed Special Form for Conscientious Objectors was received by his local board (R. 46). In the special form, petitioner's answer to question 3 is vague as to when he became a conscientious objector and, indeed, his answers to questions 3, 6, and 7 strongly suggest that he was actually seeking exemption as a minister rather than as a conscientious objector (R. 47-48). At this time, petitioner apparently was still a civilian employee at a United States Naval Base (R. 48).

On November 26, 1951, the local board continued petitioner in class 1-A, and on December

10, petitioner was accorded a personal appearance before the local board. There was before the local board at this hearing petitioner's Form 150 and a letter (R. 66-68) in which he stated that he was a minister and that he was averse to "Turning aside from that assigned duty, to engage in serving another master, to perform other work assigned by the Civil State, or refraining from preaching because of compliance with arbitrary commands to stop * * *." On his personal appearance, petitioner told the local board that "he was seeking classification as a minister and not as a conscientious objector" (Gov. Ex. ICC, R. 68-69, the local board's record of the personal appearance).⁹

After the local board, on December 11, 1951, again classified petitioner 1-A, petitioner wrote

⁸ While the case seems to have turned on lack of sincerity, without reaching the question presented in *Sicurella v. United States*, No. 250, this Term, as to the application of the statutory exemption to certain sincerely held beliefs, petitioner's own statements show only opposition to service under government authority which would interfere with his ministry. For the reasons discussed in the government's brief in *Sicurella*, petitioner would not be entitled to exemption on such grounds, even if there were no finding of lack of sincerity.

⁹ While petitioner now contends that he claimed exemption as both a minister and conscientious objector before the local board (Pet. br. 11), he testified at the trial that in executing the Form 150 he thought he was applying for exemption as a minister, and that at his personal appearance before the local board he claimed only the ministerial exemption (R. 26-32).

a letter (R. 64-65) to the local board in which he expressed his desire to appeal to the selective service appeal board, in the following terms:

Receive your letter stating that I am still in the class (1-A). Still being *unsatisfy* with it, would like to have my records stating that I am a minister of the true religion, and also the letters that were sent to you be brought up to the Board of Appeals for further consideration.

The remainder of his letter was devoted entirely to substantiating his claim for a ministerial exemption. In brief, up to this time, petitioner had adduced practically no showing of personal religious conviction against participating in war in any form.

At this point, the case before the appeal board was that of a registrant who had claimed a ministerial exemption only when he had been classified 1-A, who was employed at a United States Naval Base, and who, although he had filed the special form for conscientious objectors (Form 150), had informed both the local board and the appeal board that he was seeking only a ministerial exemption. However, as is the practice whenever a registrant's file contains a Form 150 which has not been withdrawn, the appeal board referred the case to the Department of Justice for inquiry and hearing pursuant to Section 6 (j) of the Act.

Following a hearing before a Department of Justice hearing officer and the receipt of his

report and recommendation, the Department prepared and forwarded its recommendation (R. 52-55) to the appeal board. The Department's recommendation, based upon the report of an F. B. I. investigation and the hearing officer's report, stated that a number of persons acquainted with petitioner regarded him as sincere. It referred to information that at one time petitioner had been gambling and drinking heavily, and to evidence that he had since reformed. The recommendation also referred to information obtained from police records that petitioner had been violent or abusive to his wife on three occasions between May 1950 and January 1952. The core of the Department of Justice recommendation was as follows (R. 54) :

From the available information it appears that registrant had little, if any, religious training prior to November 1949 and it was not until after his 3-A classification was changed to 1-A that he evidenced any conscientious objection. From the time he first attended a Bible study class until approximately October 1951, registrant had a little less than two years of Jehovah's Witness religious training. In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical vio-

lence towards his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952.

Thus, in finally determining petitioner's claim for exemption as a conscientious objector because of his religious convictions, the appeal board had before it a number of circumstances strongly indicating that petitioner was not sincere: (1) he claimed exemption as a conscientious objector (and as a minister) only when he was again classified 1-A upon the termination of his dependency deferment; (2) he continued to work at a naval base both before and after his religious conversion;¹⁰ (3) the fact that he sought from the local board and appeal board only a ministerial exemption suggested that his assertion of conscientious objections was both a mistake initially and an afterthought before the Department of Justice; and (4) his violent and abusive behavior toward his wife, following the commencement of his religious activities, scarcely comported with that of a person of deep religious convictions, and especially one claiming to be a minister. We submit that in these circumstances

¹⁰ The Courts of Appeals for the Ninth and Tenth Circuits have held that a registrant's willingness to work on war materials for a private employer is a factor which may be considered by selective service boards in appraising the sincerity of his claim of conscientious objection. *Roberson v. United States*, 208 F. 2d 166, 169 (C. A. 10); *White v. United States*, 215 F. 2d 782, 785-786 (C. A. 9), now pending on petition for certiorari, No. 390.

there was ample basis in fact for the action of the appeal board in denying petitioner's claim for exemption and placing him in classification 1-A.

There is no basis for petitioner's contention that this is a case in which the sincerity of his statements as to his conscientious objections is undisputed, and that his claim for exemption was denied solely upon the ground that he was a last-minute convert to Jehovah's Witnesses (Pet. Br. 28, 38).¹¹ To begin with, the principal basis for denying a claim for exemption as a conscientious objector within the statutory definition (*i. e.*, leaving aside questions as to the true character of the claim, such as are presented in *Sicurella v. United States*, No. 250) is the registrant's lack of sincerity. In the instant case, the Department of Justice recommended that petitioner's claim for exemption be denied for lack of sincerity. Thus, the crux of the Department's recommendation is the conclusion that (R. 54)

In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence toward his wife.

¹¹ Elsewhere in his brief (Pet. Br. 52), petitioner concedes that the adverse recommendation of the Department of Justice was based upon other factors as well.

As we have pointed out, the record before the appeal board contained such persuasive indications of petitioner's lack of sincerity that it can only be assumed that it denied his claim on that ground.

We do not suggest that the lateness of religious conversion or of a crystallization of religious scruples against participation in war should preclude a sincere conscientious objector from obtaining exemption. It is conceded that suddenly acquired convictions may be as sincerely held as those of long standing. However, we contend that where the initial assertion of conscientious objections coincides with the imminence of induction for military service, such circumstance, either alone or in combination with other factors, may justify denial of exemption. This Court has deemed relevant a close time parallel between sudden changes in religious activities of registrants and the selective service processes. Compare: *Eagles v. Samuels*, 329 U. S. 304, 316-317 (sudden return to divinity school at time of returning selective service questionnaire); *Eagles v. Horowitz*, 329 U. S. 317, 322 (entry into a seminary shortly after passing the physical examination and qualifying for military service). Here, as elsewhere, "the conclusions and tests of everyday experience must constantly control the standards of legal logic." 1 Wigmore, *Evidence* (3d ed. 1940), Section 27, p. 407.

However, the instant case does not present the question of whether petitioner's belated assertion of conscientious objections, taken by itself, would provide a basis in fact for the denial of his claim. Here, as we have shown, that circumstance is but one of several factors which, taken together, afforded strong support for the conclusion of the appeal board that his claim was not sincere.

B. DICKINSON V. UNITED STATES, 346 U. S. 389, DID NOT REQUIRE THAT PETITIONER'S CLAIM FOR EXEMPTION BE GRANTED

Petitioner contends that the appeal board's denial of his claim for exemption as a conscientious objector was precluded under *Dickinson v. United States*, 346 U. S. 389, in that, he says, he sufficiently established his status by his statements in the special form for conscientious objectors and the government adduced no evidence to the contrary (Pet. Br. 30-32). That is, he contends that in *Dickinson* this Court held that a registrant's conclusory statements in support of a claim for exemption must be accepted as true, no matter how inconsistent they may be with facts and circumstances disclosed by the registrant and with his conduct, unless the selective service authorities bring forward affirmative evidence to rebut his conclusions. Applied to this case, petitioner argues that the selective service boards could deny his claim for exemption only if they adduced independent evidence contradicting

his statements. We believe that petitioner has misread this Court's decision in *Dickinson v. United States, supra*, even as applied to a claim for ministerial exemption such as was involved in that case.

In the *Dickinson* case, the registrant, a Jehovah's Witness, sought exemption as a minister, supporting his claim not only by his own oral and written statements but also by written statements from the Watchtower Bible and Tract Society and other Jehovah's Witnesses (346 U. S. at 392). This Court, while reiterating that "the selective service registrant bears the burden of clearly establishing a right to the exemption" (346 U. S. at 395), held that, upon the proof presented by Dickinson, his claim for a ministerial exemption could not be denied solely because of skepticism based upon his youth and "the customary claim of Jehovah's Witnesses to ministerial exemptions." It was in this context that the majority of this Court stated (346 U. S. at 396) that:

* * * The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities.

Thus, we do not understand *Dickinson* as holding, even for claims of ministerial exemption, that selective service boards must accept as true, without regard to their inherent weakness or the

surrounding circumstances, every assertion of registrants that they satisfy statutory requirements for an exemption. The burden is on each registrant to establish clearly that he is entitled to exemption from the common duty of military service. The nature of this burden is emphasized by the unique character of the tribunals which the Congress established to determine such claims. Congress did not create the familiar type of administrative agency, such as the Interstate Commerce Commission. Nor was it under any constitutional compulsion to do so. *United States v. Nugent*, 346 U. S. 1, 8. Instead, it provided for the establishment of local boards and appeal boards composed of uncompensated civilians with local board members required to be residents of the county and recommended by the governor of the State. Congress has not imposed upon such boards formal procedural requirements and it has precluded direct judicial review of their decisions. In conscientious objector cases, even after an inquiry and hearing by the Department of Justice far more elaborate than any proceeding within the Selective Service System, the appeal board need only consider, but is not required to follow, the Department's recommendation. In brief, Congress was creating a summary procedure under which the chief safeguards against oppression are its roots in the registrant's home community and in opportunities for *de novo* review within the Selective Service System.

In this context, it is clear that Congress was placing upon each registrant claiming an exemption the entire burden of showing that he was clearly entitled to it. The registrant is free to present any evidence he desires in support of his claim. If he relies solely upon his own statements, as did the petitioner in this case, he must do so at the risk that any circumstances surrounding his claim, such as its timing in relation to the threat of induction, his demeanor, and (in conscientious objector cases) inconsistent conduct called to the attention of the appeal board by the Department of Justice, which rationally tend to impeach his claim, will support a denial of it. The registrant cannot shift the burden of proof to the selective service boards unless, as in *Dickinson*, he reinforces his personal statements with additional evidence sufficient to preclude rational men from attaching significance to circumstances which would otherwise provoke doubts.

Furthermore, *Dickinson v. United States*, *supra*, even as properly read, is not applicable here for several reasons. To begin with, that case involved a claim for a ministerial exemption which involves the relatively objective issue of whether the religious activities of a registrant and his status in relation to other members of his religious group satisfy the definition of minister in Section 16 (g) of the Act. In sharp contrast, in conscientious objector cases the cru-

cial issue is the registrant's *subjective belief*.¹² What he does is important only insofar as it reflects his mental state. Thus, the issue is the sincerity of the registrant's claim. The elusive nature of the determination is emphasized by the fact that in these cases Congress has provided that the appeal procedure for conscientious objector claims shall include an inquiry and hearing by the Department of Justice on "the character and good faith of the objections of the person concerned." For this reason, the procedure before the hearing officer is non-adversary and informal, designed to draw out the essence of what the claimant actually believes. The legislative history of Section 6 (j) which is discussed in detail in the Government's brief in *United States v. Nugent* (No. 540, O. T. 1952), shows that an essential function of the reference to the Department of Justice is to provide the selective service appeal boards with an appraisal of the sincerity of registrant's claim by an outside agency on the basis of a personal interview.

¹² The typical methods of the hearing officer are described as follows in Sibley & Jacob, *Conscription of Conscience* (1952, Cornell University Press), pp. 72-73:

The Hearing Officer's interview with the objector was usually rather informal, and to it the latter might bring friends or advisers who might be given an opportunity to testify. As likely as not, the Officer's first comments might be for the purpose of putting the appellant at ease. Questions would concern past life, religious affiliations, basis for objection, and social and political views. Frequently, the Officer would inquire into any alleged inconsistencies in the conduct

This Court has recognized the duty of the Selective Service System to prevent the exemptions provided by Congress from being used by draft dodgers. *Eagles v. Samuels, supra; Eagles v. Horowitz, supra*. The ordinary lives of most men are not clearly inconsistent with an assertion of religious scruples against participation in war. On the other hand, we know that most men are not conscientious objectors. Thus, when a registrant claims exemption as a conscientious objector, the inferences that may be drawn from his demeanor and from the circumstances surrounding the assertion of his claim take on a much greater significance than they do in the relatively objective claims for ministerial exemption or occupational or dependency deferments. If, on the basis of such factors, rational men could entertain serious doubts as to the registrant's sincerity, there exists a basis in fact for the denial of his claim.

In the instant case, petitioner's claim for exemption as a conscientious objector is based solely

of the objector: for example, how could he reconcile his service in the National Guard (at one period in his life) with his present position? Or, to illustrate more particularly: in one case the objector, shortly after Pearl Harbor, had applied for service with Naval Intelligence, wrongly thinking that it would be noncombatant service. Denied employment, he had then returned to his earlier beliefs, which had rejected both combatant and noncombatant service. The Hearing Officer tried to determine, by a series of questions, whether his return to pacifist views of the more extreme kind was sincere. The applicant convinced the Hearing Officer that his change in outlook was genuine, and the Officer thereupon recommended IV-E.

upon his own statements, in contrast with the testimony of others and the documentary evidence by which the claim for ministerial exemption in *Dickinson* was supported. Here, circumstances relating to good faith and sincerity, which were regarded as of little significance in ascertaining whether Dickinson was a minister, are crucial in determining whether petitioner is conscientiously opposed to participation in war in any form. Finally, the facts and circumstances before the appeal board in this case constitute a far more persuasive basis in fact for rejecting petitioner's claim than were present in the *Dickinson record*.¹³

II

PETITIONER WAS ACCORDED A FAIR HEARING BY THE DEPARTMENT OF JUSTICE AND HE HAS FAILED TO SHOW THAT HE WAS PREJUDICED.

The petitioner contends that he was denied a fair hearing before the Department of Justice hearing officer because the hearing officer refused to give him a fair résumé of information adverse to his claim in the F. B. I. investigative report. In the first place, the failure of the registrant to request "before the date set for the hearing" that he be advised as to the "general nature and character" of any evidence in the hearing officer's possession adverse to his claim, as required by

¹³ On the relation of the *Dickinson* case to conscientious objector claims, see also the Brief for the United States, in *Witmer v. United States*, No. 164, this Term, at pp. 18-22.

the Department's Instructions to Registrants (App. B, *infra*, pp. 56-58), which was furnished to him (R. 32), should preclude him from now complaining about the inadequacy of information supplied to him at the hearing on his spur-of-the-moment request. (Pet. Br. 40-53). We contend that petitioner was in fact adequately advised of the information adverse to his claim. Also, even assuming that he was not, we urge that since petitioner makes no attempt to show that he was prejudiced, his classification should not now be held invalid and his conviction set aside.

In this case, as in similar cases, after the selective service appeal board referred the case to the Department of Justice, the Federal Bureau of Investigation made an investigation of petitioner's claim. The report of this investigation was furnished to the hearing officer prior to the hearing and was before the Department when it formulated its recommendation to the appeal board. The report was not made available to the petitioner. In *United States v. Nugent*, 346 U. S. 1, this Court held that neither the Constitution nor the Act requires that the investigatory report be furnished to a registrant. However, we assume with the petitioner that under *Nugent* the Department must supply a registrant, at his request, "with a fair résumé of any adverse evidence in the investigator's report" (346 U. S. at 6).

At this point, it will be useful to clear up certain misunderstandings in the petitioner's brief.

First, petitioner asserts that, at the time of his hearing before the Department of Justice hearing officer, the Department's regulations prohibited the hearing officer from giving the registrant a summary or résumé of evidence adverse to his claim; he states that not until September 1953, following this Court's decision in *Nugent*, did the regulations permit the registrant to obtain such a résumé (Pet. Br. 41). These statements are erroneous. The Instructions to Registrants in effect at the time of petitioner's hearing (which are set forth in Appendix B to this brief) expressly provided that

Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

This precise provision was involved in *Nugent*, in which this Court at least implied that a registrant who failed to ask for such a résumé could not thereafter complain if his claim was denied upon the basis of evidence not disclosed to him (346 U. S. at 6-7). This disposes of petitioner's further contention that *Nugent* held that both

the Act and due process of law require that a résumé be given to the registrant regardless of whether he asks for it. Since September 1953, the Department's regulations have provided that a written résumé of both favorable and unfavorable evidence will be routinely furnished to each registrant prior to the hearing. This provision was not applicable to petitioner's hearing in August 1952. There is no basis for petitioner's repeated statement (Pet. Br. 41, 42, 52) that the Government concedes that this amendment was required by the *Nugent* decision.

Thus, petitioner was informed by the Instructions to Registrants, which were attached to the notice of hearing, that at his request "and before the date set for hearing" the hearing officer would advise him "as to the general nature and character of any evidence in his possession" adverse to his claim. Since the petitioner failed to request such a résumé prior to the hearing, as required by the regulation, he can scarcely complain if his sudden request for such a résumé in the course of the hearing results in an inadequate reply by the hearing officer. The Department does not require or encourage formality in these proceedings. However, we submit that one who was so indifferent to this offered opportunity may not later attack the hearing officer's voluntary disclosure not required by the regulations.

In any event, it is clear that petitioner was not entitled to a summary of adverse information in

the abstract, but rather to a summary of any adverse information entering into the Department's recommendation, and therefore becoming part of the basis for decision by the selective service appeal board which, rather than the Department, has decisive power. As this Court noted in *Nugent* (346 U. S. at 7, fn.), the contents of the F. B. I. investigatory report are irrelevant unless they become a part of the record before the appeal board.

In the instant case, as in other cases, the F. B. I. investigatory report was not made available to the selective service appeal board.¹⁴ Thus, the appeal board had no knowledge of the contents of the report except to the extent that they were referred to in the recommendation of the Department. Turning to the Department's recommendation (R. 52-55), the first third of it consists of a summary of the information which petitioner furnished to his local board (R. 53). Next, it recites that petitioner's neighbors and co-religionists believe him to be sincere (R. 53). Then, the recommendation states (R. 53-54) that:

A confidential informant, of known reliability, reports that during the last seven or eight months registrant was actively engaged in distributing pamphlets; that prior to that time registrant was person-

¹⁴ In *Brewer v. United States*, 211 F. 2d 864 (C. A. 4), the F. B. I. investigatory report was sent to the appeal board inadvertently.

ally known to him as a rather heavy drinker and crap shooter in and around local taverns and pool halls. This informant believes registrant is now sincere. Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed.

Admittedly, information as to petitioner's gambling and drinking would be adverse to his claim. However, since such information was coupled with evidence of his reform, the entire quoted statement would seem to confirm that his religious conversion was sincere, and thus was not adverse to his claim. In any event, the quoted statement indicates that petitioner was apprised of the evidence as to his drinking and gambling, and he has so admitted at the trial (R. 19) and in his brief in this Court (Pet. Br. 40).

Next, the Department's recommendation contains the following statement (R. 54):

Police records reflect that registrant was arrested May 29, 1950 on a complaint by his wife that he pulled her out of a car and hit her in the face—fined \$13.60; on June 12, 1950 police were called to settle a "hot argument" and on January 6, 1952, wife claimed registrant was abusive. Police settled last two matters so no charges were filed.

Since this information was not volunteered, it must be assumed that it was contained in the

F. B. I. investigatory report, as in fact it was. It was adverse to petitioner's claim and it was one of the factors expressly relied upon by the Department in recommending denial of his claim (R. 54). At the trial, petitioner testified that after the hearing officer had told him that he had the F. B. I. report concerning petitioner and that "it was reported that I was hanging around pool rooms," he asked the hearing officer "what else was in the report." Thereafter, petitioner testified, "He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine' " (R. 19).

Perhaps in most cases, a hearing officer's question would not apprise a registrant of the "general nature and character" of evidence adverse to his claim. In the instant case, however, we submit that the hearing officer's question, addressed to petitioner's wife in his presence, was a sharp and challenging indication to petitioner that the hearing officer was aware of his public record of maltreating his wife, a relatively recent matter obviously within his knowledge. It was not an allusion to the statements of a secret informant which might be unknown to petitioner. Even now, he does not contend that he did not understand this question as relating to his past treatment of his wife.

Even more significant, and assuming that petitioner was not apprised of, and given an opportunity to explain or rebut, the evidence of

his violent and abusive treatment of his wife, he has not yet offered to show that he was prejudiced. He has not yet stated, for example, that he was prepared to impeach or contradict this information obtained from police records, as by showing a mistake of identity or that he had acted in self-defense or under intense provocation.¹⁵ He does not suggest that he would have more to say than that he had since reformed, an allegation implicit in his claims for exemption as a minister and as a conscientious objector.

In a highly similar situation, involving the order of a state regulatory commission subject to more formal procedural standards and broader judicial review than are applicable to selective service determinations (*Market Street Railway Co. v. Railroad Comm. of California*, 324 U. S. 548, 561-562), this Court stated:

No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. * * * It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination,

¹⁵ Petitioner's cautious statement, buried in his brief (Pet. Br. 39), that "the truthfulness of these FBI reports is questioned," is not even an adequate allegation of prejudice.

rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate right of parties.

We submit that this rule of prejudicial error which applies to the proceedings of ordinary administrative agencies¹⁶ should be applied freely, *a fortiori*, to the proceedings of the unique selective service tribunals upon which Congress relies for expeditious administration of the Universal Military Training and Service Act. Accordingly, in the absence of such a specific showing of actual prejudice, petitioner's classification by the selective service appeal board should be sustained.

III

THE TRIAL COURT PROPERLY QUASHED PETITIONER'S SUBPENA TO COMPEL PRODUCTION OF THE F. B. I. INVESTIGATORY REPORT

Prior to the trial of this case, petitioner attempted to subpoena the F. B. I. investigatory

¹⁶ Section 10 (e) of the Administrative Procedure Act (5 U. S. C. 1009), while not applicable to selective service decisions, instructs reviewing courts that "due account shall be taken of the rule of prejudicial error." See also Rule 61 of the Federal Rules of Civil Procedure and Rule 52 of the Federal Rules of Criminal Procedure.

report made after his claim had been referred to the Department of Justice. As noted above, this report was available to the hearing officer and to the Department, but was not available to the registrant. In his affidavit in opposition to the Government's motion to quash the subpoena, petitioner contended that he was entitled to examine the entire F. B. I. investigatory report as "a part of * * * the basis of the administrative determination," and that withholding the report "will deprive the defendant of his right to be confronted by evidence given by the witnesses responsible for denial of the conscientious objector status" (R. 8-9). He also contended generally that production of the F. B. I. report would show "that defendant did not get a fair résumé of adverse evidence in said report" (R. 8). We contend that the trial judge properly quashed the petitioner's subpoena (R. 9-10).

In this Court, petitioner now contends only that he was entitled to require by subpoena the production of the F. B. I. report in order to ascertain whether he had been given a fair résumé of evidence in the report adverse to his claim. The core of petitioner's contention is that if there was adverse evidence in the F. B. I. report, other than that set forth in the Department's recommendation, it may have influenced or affected the formulation of the recommendation (Pet. Br. 64). Thus, he is inviting the courts

to inquire into the mental processes underlying the Department's recommendation.

This position is contrary to the rationale of the decision of this Court in *United States v. Nugent*, 346 U. S. 1, as petitioner himself seems to recognize by his request (Pet. Br. 72-73) that such decision be reconsidered. See also *United States v. Dal Santo*, 205 F. 2d 429, 431-432 (C. A. 7), certiorari denied, 346 U. S. 858; *White v. United States*, 215 F. 2d 782 (C. A. 9), and *Tomlinson v. United States*, 216 F. 2d 12 (C. A. 9), petitions for certiorari pending Nos. 390 and 391, this Term. It would be anomalous to hold, as this Court did in the *Nugent* case, that a registrant is not entitled to see the reports before or at the Department of Justice hearing, and yet hold that he can see them at a criminal trial after the hearing.¹⁷

¹⁷ Packer, whose case was joined with that of *Nugent* on review (Nos. 540 and 573, O. T. 1952), moved pursuant to Rule 17 (c), F. R. Crim. P., for production and inspection of the F. B. I. reports and he caused a subpoena duces tecum to be served on the New York office of the F. B. I. The trial court denied the motion for inspection and granted the government's motion to quash the subpoena (see p. 6, fn. 3, Brief for the United States, *ibid.*). In the Joint Brief for Respondents (Nos. 540, 573, O. T. 1952), respondent Packer, as his fourth point, argued to this Court that (*ibid.*, p. 181), "reversible error requiring a new trial was committed by the trial court in the *Packer* case by quashing the subpoena duces tecum issued to compel the production of the F. B. I. report at the trial." Apparently, this Court deemed the issue either fully answered by its *Nugent* opinion, or unsubstantial. Respondent Packer, in a joint Petition for Rehearing in the same case, argued that this Court erred in failing

The collateral inquiry demanded by the petitioner is inconsistent with the auxiliary role of the Department of Justice in these cases. The Department's recommendation is merely advisory; the ultimate classification is made by the selective service appeal board. As this Court said in the *Nugent* opinion (346 U. S. at pp. 8-9):

If the local board denies the claim, the responsibility for review, if sought, falls upon the appeal board. The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. Congress was under no compulsion to supply this auxiliary service—to provide for a more exhaustive processing the conscientious objector's appeal. Registrants who claim exemption for some reason other than conscientious objection, and whose claims are

to consider the issue of whether he should have been allowed to subpoena and inspect the F. B. I. reports at the trial, stating (p. 45):

The courts cannot determine whether a résumé is fair without seeing the F. B. I. report. It cannot be seen without having it produced. Its production cannot be compelled without subpoena. The proper subpoena in the *Packer* case was improperly quashed. The importance of this question commands that this Court grant this petition for rehearing.

Respondent Packer also joined in a Motion for Clarification of Opinion in which he prayed this Court to remand the case to the Court of Appeals "for further proceedings on the questions properly raised but not determined." This Court denied both applications. 346 U. S. 853.

denied, are entitled to no "hearing" before the Department. Yet in this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's "appropriate investigation" nor its "hearing" is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant.

Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. Certainly, this is an important and delicate responsibility, but we do not think the statute requires the Department to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation.

The Court then concluded (346 U. S. at pp. 5-6) :

* * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F. B. I. reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.

Since it is the action of the appeal board, rather than the recommendation of the Department of Justice, which is decisive, there is ordinarily no reason to determine whether the F. B. I. report contained adverse information which never became known to the appeal board. In the instant case, only the recommendation of the Department of Justice was sent to the appeal board. Since the Department's recommendation was based in part expressly upon evidence of petitioner's maltreatment of his wife, he was entitled, upon a proper request, to a résumé of the adverse evidence. Assuming that the F. B. I. report contained other adverse evidence which was not referred to and relied upon in the Department's

recommendation, it would be irrelevant in determining whether petitioner's classification by the appeal board has a basis in fact. Any other rule would place the courts in the position of setting aside selective service classifications, for which Congress has provided uniquely limited judicial review, upon the basis of matters occurring in the auxiliary and non-decisive proceedings before the Department and unknown to the appeal board. We submit that the reasoning which led this Court in *Nugent* to hold that the Act does not require the Department "to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation," also precludes such a collateral attack at the trial when the Department's recommendation has been superseded by the appeal board's decision. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 318-319; *C. & S. Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103, 109.¹⁸

In the instant case, petitioner failed to make any showing in the trial court in support of his attempt to compel production of the F. B. I. report, and he does not attempt to make such

¹⁸ The district court opinions cited by petitioner (*e. g.*, *United States v. Evans*, 115 F. Supp. 340 (D. Conn.) ; *United States v. Stasevic*, 117 F. Supp. 371 (S. D. N. Y.)), which assume that the "fairness" of the résumé given the registrant at the auxiliary hearing before the Department of Justice is a matter which is legitimately in issue in every enforcement case, fail to consider the advisory nature of the Department of Justice hearing.

a showing now. He has at no time set forth reasons for belief that the F. B. I. report contained information adverse to his claim which was not disclosed to him and openly referred to in the Department's recommendation. Rather, he contends that every registrant whose claim for exemption as a conscientious objector is denied, and who is thereafter prosecuted for refusal to be inducted, can compel production of the F. B. I. investigatory report in the vague hope that it contains adverse evidence which was not disclosed to him in the résumé authorized by the Department's regulations.

We submit that, particularly in view of the auxiliary and nondecisive character of the proceedings before the Department of Justice, an inquiry into the regularity of such proceedings is a purely collateral matter which should not be undertaken without a preliminary showing that the registrant's rights were violated. There may perhaps be special circumstances, as, for example, if the facts in the résumé given to a registrant are substantially different from those referred to in the Department's recommendation, where the interest of justice may require a court to examine the F. B. I. investigatory report.¹⁹ There

¹⁹ Another special set of circumstances was presented in *Brewer v. United States*, 211 F. 2d 864, 866 (C. A. 4), where, by inadvertence, the F. B. I. reports were sent to the appeal board. Since they thus became a part of the file on which the appeal board acted, the court ruled that the registrant was entitled to see them.

could conceivably be a showing that the Department's recommendation was based on undisclosed information to such an extent that the court would be justified in examining into the issue even though the appeal board did not have such information. But, certainly, there must be some such showing of special circumstances to justify a court in going behind the record on which the appeal board, which had the duty of classifying, acted.²⁰ Where the Department has stated the basis for its recommendation, a court would not be justified in assuming that it may have acted on some different, undisclosed basis. The usual presumption of regularity should attach to the Department's recommendation. *Koch v. United States*, 150 F. 2d 762, 763 (C. A. 4); *United States v. Fratricks*, 140 F. 2d 5, 7 (C. A. 7). See also: *Bute v. Illinois*, 333 U. S. 640, 672; *Ex parte Royall*, 117 U. S. 241, 252; *Coggins v. O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *White v. Humphrey*, 115 F. Supp. 317, 322 (M. D. Pa.).

²⁰ It should be noted that, even where circumstances are shown which would justify an order to produce the F. B. I. reports, the confidential nature of such reports would require that the normal procedure for the handling of such confidential materials be followed, *i. e.*, the documents should first be produced for inspection by the court as to their possible relevancy and should be shown to the defendant only if the judge finds them relevant. *United States v. Cohen*, 145 F. 2d 82, 92 (C. A. 2), certiorari denied, 323 U. S. 799; *Boehm v. United States*, 123 F. 2d 791, 807-808 (C. A. 8), certiorari denied, 315 U. S. 800; *United States v. Schneiderman*, 104 F. Supp. 405, 410 (S. D. Cal.).

Petitioner relies upon a group of cases holding that the government's privilege with respect to confidential reports cannot be invoked to bar disclosure of documents which may have a direct bearing on the issues presented at the trial. *United States v. Reynolds*, 345 U. S. 1, 12; *United States v. Beekman*, 155 F. 2d 580 (C. A. 2); *United States v. Krulewitch*, 145 F. 2d 76 (C. A. 2); *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2). That issue is not, however, reached in this case because, whether a document is privileged or not, its production cannot be compelled without some showing that it would, if produced, be material to the case. For purposes of laying a foundation for the production of a document (as opposed to its admission into evidence or other use made of it on the trial) it must appear to the trial court that the evidence sought "is relevant, competent, and outside of any exclusionary rule". *Gordon v. United States*, 344 U. S. 414, 420. No such showing was made here. The demand was not intended to produce materials necessarily evidentiary, but was "a fishing expedition to see what may turn up" (*Bowman Dairy Co. v. United States*, 341 U. S. 214, 221), an invalid basis on which to compel inspection of a confidential government document. Petitioner cites Rule 17 (c) of the Federal Rules of Criminal Procedure, as authority, *inter alia*, for his attempted subpoena of the F. B. I. report

(R. 8). This rule is by its terms a device for compelling the production of *evidence*, not the pre-trial discovery procedure which is otherwise provided for by Rule 16. And relief under Rule 16, permitting a defendant pre-trial discovery and inspection in certain cases, is contingent upon "a showing that the items sought may be material to the preparation of his defense and that the request is reasonable". See: *Bowman Dairy Co. v. United States*, 341 U. S. 214, 219, 221; *United States v. Iozia*, 13 F. R. D. 335, 338.

There is no showing of special circumstances which would render relevant and material an unevaluated F. B. I. report which was not before the appeal board. The subpoena was therefore properly quashed.²¹

²¹ Petitioner raised as a "question presented" in his petition (Pet. 5-6), but did not expand and does not now argue, the contention that the Selective Service System erred in failing to reopen his final classification on the basis of an affidavit, setting forth that his wife was confined in a tuberculosis sanatorium with an advanced form of that disease, and that she would be dependent on her husband "when she is able to leave the hospital." A letter signed by the medical director of the hospital was dated January 20, 1953 (R. 63), about 14 days after petitioner had been ordered to report for induction. Up to December 17, 1952, when petitioner was finally classified 1-A by his appeal board (R. 41), he apparently had said nothing in any document of record concerning any illness of his wife. The regulations provide that a classification "shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circum-

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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JANUARY 1955.

stances over which the registrant had no control." 32 C. F. R. Section 1625.2. Even though "new facts are presented," if "the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification." 32 C. F. R. Section 1625.4. Since petitioner's wife was not dependent on him at the time of the order to report and the date of her release from the sanitarium could not be foreseen at that time, petitioner could not show "extreme hardship" which alone justified deferment because of the dependency of a wife under Section 6 (h) of the Act.

APPENDIX A

STATUTE AND REGULATION INVOLVED

Universal Military Training and Service Act,
62 Stat. 604, 65 Stat. 75:

Section 6 (h) [50 U. S. C. App. 456 (h)]:

* * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable * * *.

Section 6 (j) [50 U. S. C. App. 456 (j)]:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections

whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as

the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Regulations of the Selective Service System:

32 C. F. R. 1625.2:

When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed

to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

APPENDIX B

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Notice of Hearing

City State Date

To: -----

Name of Registrant

Street Address City State

You are hereby notified that before the undersigned Hearing Officer at

Room -----,

Building Street Address

-----, at -----

City State Hour

o'clock on -----, 195--, a hearing

Month Day

will be held by the Department of Justice to consider your claim to exemption from training and service under the Universal Military Training and Service Act by reason of your alleged conscientious objection to participation in war in any form. You have a right to be present at such hearing and to present any pertinent evidence in support of your claim. Enclosed is a copy of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed." You should read these instructions carefully.

-----, *Hearing Officer*
Special Assistant to the Attorney General

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

*Instructions to Registrants Whose Claims for
Exemption as Conscientious Objectors Have
Been Appealed*

Pursuant to the provisions of section 6 (j) of the Universal Military Training and Service Act and Section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of your claim for exemption from training and service under the said Act on the ground that you are conscientiously opposed to participation in war in any form.

1. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General.

2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant

more fully to prepare to answer and refute at the hearing such unfavorable evidence.

3. At the hearing you will be permitted to make a full and complete presentation of your claim. You may bring with you to the hearing as witnesses any persons who have personal knowledge of facts concerning your religious training and belief and concerning the character and good faith of your objections to participation in war in any form.

4. You may bring with you and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning your religious training and belief and the character and good faith of your objections to participation in war in any form. Such statements shall be sworn to or affirmed before a notary public or other person authorized to administer oaths. You may also submit at the hearing any papers or documents, or certified copies thereof, tending to support your claim. If you are unable to appear personally at the hearing, you may mail all such statements, documents, etc., to me at the address given in the Notice of Hearing.

5. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. You will not be required to adhere to the ordinary rules of evidence. It will not be necessary for you to be represented

at the hearing by an attorney. You may bring with you a relative or friend or other adviser, who may sit with you at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under my direction and control. Violation of these instructions by you or your adviser may result in the termination of the proceeding.

*Special Assistant to the
Attorney General*